Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What are the standards for imposing liability upon an employer for a hostile work environment created by the sexual harassment of an employee by a supervisor?

A. Does the Restatement (Second) of Agency § 219(2)(d) provide two separate standards for imposing liability on the employer under Title VII or must both provisions of § 219(2)(d) be present to establish liability of the employer?

B. Can an employer escape liability where it has an established written sexual harassment policy, makes that policy known to its employees, vigorously enforces that policy, and has an established grievance process available for employees experiencing problems in their employment situation?

C. Are employers strictly liable for a hostile work environment created by sexual harassment committed by a supervisor against an employee?

II. Can a Collective Bargaining Agreement compel an employee to arbitrate a claim that she may have under one of the federal statutes, such as Title VII of the Civil Rights Act?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Eddy Potash, Inc. (*EPI*), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered May 8, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported officially at 112 F.3d 1437, 1997 WL 231434, 73 Fair Empl. Prac. Cas. (BNA) 1384 (10th Cir. (NM) 1997) and is reproduced in the Appendix filed herewith (Appendix A).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on May 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a)

National Labor Relations Act, § 185

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2

Section 3 of the FAA, 9 U.S.C. § 3.

Section 16 of the FAA, 9 U.S.C. § 16

Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991).

Section 12212 of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12212.

Pursuant to Supreme Court Rule 14(f), the relevant portions of these statutes are set forth, *infra*, at Appendix F, pp. 69a-75a.

STATEMENT OF THE CASE

A. Introduction

Over the past several years, the issue as to when an employer may be held liable under Title VII for a lower level supervisor's sexual harassment which allegedly created a hostile working environment has been the subject of a massive amount of litigation and heated debate. The federal courts have found themselves in conflict and disarray as to what standards are applicable. The courts are unsure as to the proper standards to apply. The Eighth Circuit recently recognized the confusion by noting the issue is the subject of less than clear precedent. *Davis v. City of Sioux City,* 115 F.3d 1365, 70 Empl. Prac. Dec. P. 44,778 (8th Cir. (Iowa), Jun. 18, 1997) (No. 96-2194). As a result, employers across this nation are unsure as to the standards to which they will be held. The facts of this case clearly present that issue.

Also, with arbitration of employees' statutory employment discrimination claims gaining widespread acceptance from the courts, the question of whether a union employee must first invoke the grievance process in a Collective Bargaining Agreement (CBA) before that union member may seek redress in court for the statutory employment discrimination claim has likewise become the center of litigation and debate. National labor policy is an arena which "[p]eculiarly . . . calls for uniform law." *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (quoting *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919). The courts are in disagreement on this issue and have failed to achieve uniformity. This issue also involves a major question regarding judicial economy in courts with ever more crowded dockets. The facts of this case distinctly and clearly present both issues.

B. Facts

EPI operates an underground potash mine near Carlsbad, Eddy County, New Mexico. The Defendant, R. L. Brown (*Brown*), was a low-level supervisor with the responsibilities of a shift foreman and face boss. The position of face boss is the lowest supervisory level at EPI. EPI had combined the duties of an underground shift foreman and face boss. Brown, as the shift foreman, had no authority to hire, no authority to fire, and no authority to discipline. The extent of Brown's authority as an underground shift foreman/face boss was to make work assignments for members of his crew and pair members of his crew to accomplish those work assignments.

At all times material to this case, EPI had a written policy against sexual harassment in effect. The sexual harassment policy was drafted and adopted in 1989. It had been disseminated throughout the mine. It was posted on all bulletin boards where any employee wishing to read it had the opportunity to read such policy. It is undisputed EPI's sexual harassment policy was actively enforced by management.

In addition to the written sexual harassment policy, there existed a CBA between EPI and the United Steel Workers of America (*USWA*) Local 177. The CBA outlined the terms and conditions of employment as well as the grievance procedure the employees were to follow when problems arose in their employment situation. A policy against sexual discrimination was contained in the CBA at Article 18.8. (*See* Appendix E, p. 68a). The CBA also contained a mandatory grievance and arbitration process for aggrieved employees to follow. (*See* Appendix E, pp. 65a-67a).

When management found it necessary to discipline an employee, EPI was required to adhere to the following process:

The employee was initially given an oral warning. Brown had no authority to issue an oral warning. Brown's only authority was

to report an infraction to upper-level management and await upper-level management's response as to the appropriate action to be taken regarding the employee's infraction. The second level in the disciplinary process was to issue a written warning to the employee. Brown's participation at the second level was identical to his participation in the first level oral warning stage, which was to simply advise upper-level management of the infraction. Upper-level management then made the decision to issue the written warning and its contents. The third level in the disciplinary process was suspension of the employee from work. Again, Brown had no involvement other than reporting the infraction to upper-level management. EPI's decision as to the appropriate level of disciplinary action to be invoked was made by a committee or group of upper-level management personnel. Brown, as an underground shift foreman/face boss, was not a member of, nor participant in, the group. More importantly, because of the existence of the CBA, there was very little discretion regarding the action to be taken as to the various levels of discipline as they were primarily controlled by the CBA. Because of the CBA, even upper-level management exercised limited discretion in the disciplinary process. Brown, as an underground face boss/shift foreman, had no authority to determine who was assigned to his crew or what work was to be done. Those decisions were controlled by upper level management. The extent of Brown's authority was to pair the workers assigned to his crew and to delegate the paired workers to the tasks to be accomplished.

The Respondent, Jeanne Harrison (*Harrison*), began working for EPI as an underground potash miner in May of 1992. Harrison was assigned to Brown's crew. As an underground potash miner, Harrison participated in the "buddy system." The buddy system was one in which each miner was assigned another laborer. The two then worked together within a section of the mine away from other members of his or her crew. If a miner was not assigned a "buddy" on a particular shift, he or she was designated the extra person and was typically assigned to perform miscellaneous duties. On May 5, 1993, Harrison was working with her regular partner

when Brown drove up with a replacement "buddy" for Harrison and requested that Harrison accompany him to get some supplies. On the way to get the supplies, Brown stopped the vehicle in which they were riding and engaged in sexual activity with Harrison. Again, on May 15, 1993, Brown came to the place where Harrison was working and requested that Harrison go with him to locate a part that the mechanic needed to fix a piece of broken machinery in Harrison's section. On the way to obtain the part, Brown again stopped the vehicle in an isolated area of the mine and engaged in sexual activity with Harrison. On May 24, 1993, Harrison accompanied Brown to check on methane readings and to make sure an area where methane was present was properly curtained off. During this trip, Brown engaged in sexual activity with Harrison. On June 7, 1993, Harrison was helping Brown deliver a load of supplies to a machine. On the way to delivering the supplies, Brown stopped the vehicle and engaged in sexual activity with Harrison. Finally, on June 27, 1993, Brown requested Harrison accompany him to shovel materials in tunnels in the mine. On the way there, Brown attempted to engage in sexual activity with Harrison and Harrison refused. Brown made no further attempts to engage in sexual activity and drove Harrison back to continue the work that she was performing when he picked her up. Later that same day, Harrison assisted Brown in the task of cleaning his office. At that time, Brown and Harrison engaged in sexual activity.

It is undisputed that in all of these incidents, Brown never used his authority to threaten or coerce Harrison into engaging in any of the activities. It is likewise undisputed that Brown never conditioned tangible job benefits on Harrison's submission to the sexual activity. During the June 27, 1993 incident, Harrison refused Brown's request. Brown abided by her wishes and no sexual activity occurred at that time.

On June 28, 1993, Harrison called the line foreman and told him she was having some problems and needed to take some vacation days to finish out the remainder of her 11-day shift. The next scheduled work day, Harrison called in sick. She did the same

the following day. On July 7, 1993, Harrison called Dale Janway (*Janway*), the manager of EPI's Safety Office, and told him of the activities that had been occurring with Brown. Janway immediately contacted Kenneth Leivo (*Leivo*), EPI's Human Resources Manager. Leivo immediately began an investigation. Leivo telephoned Harrison and informed her that she would be on administrative leave with full pay and benefits pending the outcome of the investigation. Leivo also asked Harrison to prepare a written statement outlining what had happened. During the course of Leivo's investigation, he contacted Harrison several times on the telephone. Leivo interviewed Brown regarding Harrison's allegations. Brown had claimed the relationship was consensual. Though admitting she never orally told Brown she did not want to engage in the sexual activities, Harrison contended the relationship was not consensual. There were not any third party witnesses of any nature. EPI was left with a credibility issue as between Brown and Harrison. On July 14, 1993, seven days after the complaint was first received, Leivo issued a three-page determination and disposition outlining his conclusions resulting from his investigation. As a result of EPI's investigation, Brown was formally reprimanded for his involvement in the incident and was placed on permanent probation for the rest of his work life at EPI. Further, Brown was prohibited from having any contact whatsoever with Harrison. Harrison was transferred from Brown's crew to another work crew in a separate portion of the mine. Harrison never returned to work. However, Harrison remained on EPI's payroll for approximately one year. Harrison had claimed she was incurring emotional problems as a result of the sexual encounters with Brown. EPI paid all medical bills for Harrison during the ensuing 12 months. On June 17, 1994, Harrison's employment was terminated due to a reduction in force occasioned by economic conditions in the potash industry. Because of Harrison's lack of seniority, she was permanently laid off from work at EPI.

When Harrison complained of the sexual activities with Brown, EPI took immediate and effective corrective action. No further harassment occurred after Harrison brought her complaints to

management. Also, Harrison acknowledged seeing the written sexual harassment policy posted on the bulletin board during the time in which these incidents were occurring, though she claims she never read it. At no time did Harrison ever invoke the grievance procedure as contained in the CBA.

C. Proceedings

On September 16, 1994, Harrison filed a complaint against EPI and Brown in the United States District Court for the District of New Mexico alleging sexual harassment in violation of Title VII and a number of supplemental state law tort claims. Subject matter jurisdiction in the District Court over these claims was alleged to be under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. Prior to trial, Defendants EPI and Brown filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction arguing that Harrison's failure to invoke the grievance procedure as contained in the CBA resulted in a denial of subject matter jurisdiction to the District Court. (*See* Appendix B). The Motion to Dismiss (*see* Appendix B) was denied and a week-long jury trial was conducted with a verdict being returned in favor of EPI and against Harrison on February 7, 1996. (*See* Appendix D). The jury returned a verdict in favor of Plaintiff Harrison against Defendant Brown on state common law tort claims for battery and intentional infliction of emotional distress (*see* Appendix D) but declined to impose liability against Defendant EPI for Brown's actions.[1] On February 27, 1996, Harrison filed her Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. EPI filed its Cross-Appeal raising the claim that the District Court had erred in denying Defendant EPI's Motion to Dismiss for Lack of Subject Matter Jurisdiction on the basis of Harrison having failed to exhaust her remedies under the CBA. On May 8, 1997, the United States Court of Appeals for the Tenth Circuit issued its decision reversing and remanding the District

1. It should be noted, the sexual harassment question submitted to the jury involved only a claim of hostile working environment and no claim of quid pro quo harassment. Harrison had agreed there was no basis for a quid pro quo claim.

Court's judgment with the direction that the District Court give a different jury instruction concerning § 219(2)(d) of the Restatement (Second) of Agency. The Tenth Circuit denied EPI's cross-appeal and affirmed the District Court's decision denying EPI's Motion to Dismiss for Lack of Subject Matter Jurisdiction due to Harrison's failure to invoke the grievance procedure in the CBA prior to filing suit against EPI. In its opinion reversing and remanding the judgment, the Tenth Circuit opined that the employer was liable for the acts of a supervisor if the existence of the employment relationship assisted the supervisor in any way in the accomplishment of the harassment. In affirming the District Court on the issue of whether Harrison must have exhausted her remedies under the CBA the Tenth Circuit relied upon *Alexander v. Gardner Denver* as still controlling.

PART I

REASONS FOR GRANTING THE WRIT ON THE TITLE VII ISSUE OF RESPONDEAT SUPERIOR

In *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986), this Court held that under Title VII employers were not strictly liable for a hostile work environment created as a result of sexual harassment by a supervisor upon an employee. The instruction from this Court was that the principles of agency would be used to determine when an employer might be liable for a hostile work environment created by a supervisor. In this case, the Tenth Circuit's purported application of agency principles to employer liability for acts of a supervisor under Title VII presents the following reasons for this Court granting a writ:

1. The Tenth Circuit's decision is in contradiction to *Meritor Savings Bank, F.S.B. v. Vinson, supra.*, because, while purporting not to have adopted strict liability, in reality, the Tenth Circuit has, for all practical purposes, adopted a standard of strict liability. Decisions by a Circuit Court of Appeals failing to follow, or in contradiction to, a United

States Supreme Court decision constitute a basis for granting a petition for writ of certiorari.

2. There exists extreme conflict between the Circuit Courts of Appeal as to the standards to be applied in determining when an employer will be liable under Title VII for hostile work environment in the form of sexual harassment when committed by a lower level supervisor. The vast differences among the various circuits have led to confusion and uncertainty as to what should be the proper standard for determining liability.

3. The issue in this case as to what standards are to be used when determining whether or not an employer will be liable for the actions of a lower-level supervisor in a hostile work environment situation presents a matter of nation-wide importance which affects millions of workers and their employers. Employers carrying on business throughout the United States in the various circuits are now presented with inconsistency where there is an obvious necessity for consistency. A uniform rule of law is necessary to allow a consistent application of work rules and policies by employers for their employees throughout the nation. Presently, an employer doing business in one circuit may, irrespective of that employer's policies against sexual harassment, face liability for the actions of a supervisor, when, in another circuit that employer will not face liability for those same actions. Also, one employer's response to the actions of a supervisor will, in one circuit, insulate the employer from liability for the supervisor's actions while in another circuit, such as the Tenth Circuit, an employer's response will not. In addition, the decision of the Tenth Circuit, in adopting a rule that is tantamount to strict liability, defeats a major goal of Title VII, which is stopping sexual harassment, because it tends to eliminate the incentive on the part of employers to adopt rules against sexual harassment and to see that those rules are enforced.

I.

THIS COURT HAS RULED THAT EMPLOYERS ARE NOT STRICTLY LIABLE FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY A SUPERVISOR ON AN EMPLOYEE. THE TENTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT.

The Tenth Circuit Court's opinion in this case directly conflicts with this Court's ruling in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, this Court expressly held that employers are not automatically liable for sexual harassment by their supervisors. Rather, the Courts were directed to look to principles of agency. In articulating the rationale for the rule that employers are not automatically liable for sexual harassment committed by their supervisor, this Court referred to Congress' decision to define an employer to include any agent of the employer thereby evidencing an intent to place some limits on the acts of employees for which employer under Title VII are to be held responsible. *Meritor* at 72.

In this case, the Tenth Circuit has stretched its analysis of employer liability for sexual harassment committed by its supervisors so as to impose strict liability on the employer. In applying the principles of agency as contained in § 219(2)(d) of the Restatement (Second) of Agency the Tenth Circuit has bifurcated the apparent authority basis for liability so as to impose liability on the employer whenever the supervisor is in any way aided in the accomplishment of the harassment by the existence of the employment relationship without any requirement that there be any apparent authority or reliance upon that apparent authority by the employee. Such a standard is tantamount to strict liability. By its very nature, the employment relationship brings the supervisor and the employee together at the place of employment and assists the supervisor in the accomplishment of the harassment. The Tenth Circuit says it is not adopting strict liability and attempts to draw a

distinction between its ruling and strict liability. The Tenth Circuit's distinction is illusory. It is difficult, if not impossible, to envision a situation where the supervisor, by the very nature of his supervisory position is not aided by the existence of the employment relationship. The Tenth Circuit expressly states that liability will not attach where the harasser's agency relationship merely provided him with proximity to the Plaintiff. In the present case, the existence of the employment relationship is all that the Tenth Circuit requires, because it is undisputed that Brown never used his authority to threaten or coerce Harrison into engaging in any sexual activities and never conditioned tangible job benefits on Harrison's submission to sexual activities. The Tenth Circuit's basis for imposition of liability on EPI was that Brown, as a supervisor, was able to arrange for Harrison and himself to be alone in areas in which they could engage in sexual activity. The Tenth Circuit ignored the fact that a written policy against sexual harassment existed at EPI and that the policy was actively enforced. The Tenth Circuit did not discuss or recognize the fact that because the policy was in effect and in force, Brown could not have been acting within his scope of authority and employment. The Tenth Circuit ignored the fact that EPI had immediately investigated Harrison's complaints and taken quick and effective remedial action. Imposition of liability under these facts and circumstances is strict liability. Under the Tenth Circuit's decision, the existence of a written policy against sexual harassment and its vigorous enforcement by an employer is of no consequence. It is likewise of no consequence as to how fast and effectively the employer reacts to a complaint of sexual harassment. This ruling, which imposes strict liability on the employer, leaves employers with very little incentive to take action to insure that a work place is free from sexual harassment. In the present case, liability has been imposed despite the fact EPI had a sexual harassment policy in effect and actively enforced it. The decision ignores the fact the supervisor in no way used his authority to coerce Harrison into engaging in these activities. Imposition of strict liability is contrary to the spirit of Title VII and this Court's decision in *Meritor*. This Court should grant certiorari to reaffirm that strict liability on the employer is inappropriate in Title VII

hostile work environment sexual harassment cases. As will later be developed in this Petition, in addition to this Court needing to grant a writ to correct the Tenth Circuit's adoption of strict liability, the confusion existing in the courts as to what should be the proper standards for imposition of employer liability needs delineating.

II.

THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RESOLVE THE SPLIT IN THE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING THE BASIS FOR EMPLOYER LIABILITY DUE TO A HOSTILE WORK ENVIRONMENT CAUSED BY SEXUAL HARASSMENT OF A SUPERVISOR AGAINST EMPLOYEES AND TO DEFINE A UNIFORM RULE OF LAW APPLICABLE TO THE WORK PLACE.

In *Meritor*, this Court declined to issue a definitive rule on employer liability for sexual harassment committed by supervisors against employees and directed the Circuit Courts of Appeal to look to principles of agency for guidance in the determination of employer liability for sexual harassment under Title VII. *Meritor* at 72. This Court's reluctance to issue a definitive rule on employer liability has resulted in extreme disparity, confusion and conflict regarding the standards for holding an employer liable. The conflict between the Circuits results in employers being held to different standards depending upon within which circuit they engage in business. Such disparity seriously undermines the policy underlying Title VII. The goal of a uniform interpretation of Title VII is as desirable and necessary as is this Court's previously announced goal of uniformity of interpretation of the law applicable to CBAs. *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95 (1962).

The recent D.C. Circuit's decision is illustrative of the degree of conflict that exists between the various circuits. In *Gary v. Long*,

59 F.3d 1391 (D.C. Cir. 1995),[2] the D.C. Circuit, faced with facts similar to those in this case, found no employer liability. The plaintiffs in the *Gary* case were attempting to establish liability under the Restatement § 219(2)(d) language "or he was aided and accomplished of the tort by the existence of the agency relationship." *Gary* at 1397. The D.C. Circuit stated " 'that, in a sense, a supervisor is always aided in accomplishing a tort by the existence of the agency' because his responsibilities provided proximity to and regular contact with the victim." *Gary* at 1397. The *Gary* court noted that the commentary to the Restatement (Second) of Agency § 219(2)(d) suggests an exception that holds the employer liable only if the tort was accomplished through conduct associated with the agency status. *Gary* at 1397. The court in *Gary* held that plaintiff could not avail herself of § 219(2)(d) for one overriding reason: "she could not have believed that her supervisor was acting within the color of his authority due to the known policy prohibiting sexual harassment." *Gary* at 1397-98. The *Gary* court then holds that "an employer may not be held liable for a supervisor's hostile work environment sexual harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew of, or should have known, that the employer did not tolerate such conduct and that she could have reported to the employer without fear of adverse consequences." *Gary* at 1398. Based upon the finding that under these facts the plaintiff could not have reasonably relied on any apparent authority, the D.C. Circuit determined the employer was not liable. The *Gary v. Long* decision is diametrically opposed to the decision reached by the Tenth Circuit in the present case. As stated, EPI had a sexual harassment policy which was vigorously enforced. Harrison acknowledged she was aware of the policy. Nevertheless, the Tenth Circuit imposed liability on the employer, EPI, simply on the basis that Brown, the supervisor, was aided in accomplishing the tort by the existence of the employment relationship because his responsibilities as a supervisor provided

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2. The Tenth Circuit cited this case in its opinion but refused to follow it.

proximity to and regular contact with Harrison. As these two cases clearly illustrate, there is significant conflict between the Circuit Courts of Appeal.

While the conflict between the D.C. Circuit and the Tenth Circuit is illustrative, the conflict is not limited to these two circuits. A review of the most recent opinions out of each circuit illustrates the significant conflicts between the circuits on the scope of employer liability.

First Circuit Court of Appeals: In *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 73 Fair Empl. Prac. Cas. (BNA) 789, 70 Empl. Prac. Dec. P 44,696, 6 A.D. Cases 985 (1st Cir. (Me.), Mar. 19, 1997) (No. 96-1224), the First Circuit held that an employer is liable for a hostile working environment involving sexual harassment perpetrated by its supervisor upon its employees if upper level management of the institution knew, or should have known, the harassment was occurring. Even if the harassment was known, the employer cannot be held liable if it can show it took appropriate steps to halt the harassment. In contrast, in the Tenth Circuit, the employer's lack of knowledge sexual harassment was occurring is of no avail. Also, in the Tenth Circuit, where there is knowledge of the sexual harassment occurring, corrective steps will be of no help in the employer escaping liability.

Second Circuit Court of Appeals: In *Perry v. Ethan Allen, Inc.*, 115 F.3d 143 (2nd Cir. (Vt.), June 02, 1997) (No. 912, 96-7639, 913, 96-7545), the court, citing *Meritor* as authority, made reference to the principals of agency, and determined that a supervisor is liable (1) if the supervisor used his authority to condition tangible job benefits on the employee's submission to the harassing conduct (2) or the supervisor used his authority to further the creation of a discriminatorily abusive work environment or (3) the employer provided no reasonable avenue for complaining about the harassment or the employer knew of the harassment and did nothing. That decision is likewise contrary to this case decided by the Tenth Circuit.

Third Circuit Court of Appeals: An employer is liable where a supervisor, acting outside the scope of employment, purported to act on behalf of the employer or the supervisor was aided in the accomplishment of the harassment by the existence of the agency relationship and there was reliance upon the supervisor's apparent authority. *Robinson, et al. v. City of Pittsburgh, et al.*, __ F.3d __, 1997 WL 386102, 74 Fair Empl. Prac. Cas. (BNA) 359 (3rd Cir. (Pa.), Jul. 14, 1997) (No. 95-3594). The Tenth Circuit's decision is contrary to the Third Circuit's decision, because, in the Tenth Circuit, the supervisor does not even have to purport to be acting within the scope of employment. Also, the Tenth Circuit decision negates reliance by the harassed employee on the supervisor's apparent authority.

Fourth Circuit Court of Appeals: Where sexual harassment occurs outside the scope of employment, liability for the supervisor's sexual harassment may only be imputed to the employer where the supervisor exercises actual authority in harassing plaintiff or plaintiff's belief that supervisor has apparent authority to do so is reasonable. *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3d Cir. 1994).[3]

Fifth Circuit Court of Appeals: An employer is only liable if the employer knew or should have known of the harassment and did nothing to take steps to repudiate the conduct and eliminate the hostile work environment. *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 63 Fair Empl. Prac. Cas. (BNA) 765, 63 Empl. Prac. Dec. P. 42,723 (5th Cir. (Tex.), Dec. 17, 1993) (No. 93-1450), and *Canutillo Independent School Dist. v. Leija*, 101 F.3d 393, 114 Ed. Law Rep. 439 (5th Cir. (Tex.), Nov. 27, 1996) (No. 95-50791).

Sixth Circuit Court of Appeals: An employer is liable under the principles of agency, but liability can be negated if the employer responds adequately and effectively once the employer learns of the harassment. *Wathen v. General Elec. Co.*, 115 F.3d 400, 74 Fair

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3. The Tenth Circuit cited this case and refused to follow it.

Empl. Prac. Case. (BNA) 48 (6th Cir. (Ky.), June 10, 1997) (No. 95-6339).

Seventh Circuit Court of Appeals: An employer is only liable if a supervisor who was acting outside his scope of employment purported to speak or to act on behalf of employer, or supervisor was aided in the harassment by the apparent authority and there was reliance on the part of the employee on that apparent authority. *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848 (7th Cir. 1996).

Eighth Circuit Court of Appeals: The court declined to impose liability for a supervisor's actions outside the scope of his authority absent actual or constructive knowledge of the harassment. Therefore, an employer is only liable for the sexual harassment on the part of a supervisor where the supervisor was acting within the scope of his employment or the employer knew or should have known of the actions of the supervisor. *Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir. (Iowa), Jun. 18, 1997) (No. 96-2194).

Ninth Circuit Court of Appeals: An employer is liable for failing to remedy or prevent hostile work environment where the employer knew or, in the exercise of reasonable care, should have known of the harassing conduct and failed to remedy the harassment. *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

Eleventh Circuit Court of Appeals: The court felt there was sufficient confusion and disagreement within the Eleventh Circuit, itself, as to the basis for imposing liability that the court convened *en banc* on April 15 to consider the issue in the case of *Faragher v. City of Boca Raton*, 111 F.3d 1530, 65 USLW 2701, 73 Fair Empl. Prac. Case. (BNA) 1468, 70 Empl. Prac. Dec. P 44,634, 10 Fla. L. Weekly Fed. C 906 (11th Cir. (Fla.) Apr. 15, 1997) (No. 94-4878). The court in *Faragher* held, and it was reaffirmed in a later case by the Eleventh Circuit in the case of *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 74 Fair Empl. Prac. Case. (BNA) 217 (11th Cir. (Ala.), Jun. 30, 1997) (No. 96-6064), that an employer is

insulated from liability under Title VII for a hostile work environment sexual harassment claim premised on constructive knowledge of the harassment when the employer has adopted an anti-discrimination policy that is comprehensive, well known to the employees, vigorously enforced, and provides alternative avenues of redress.

As these cases illustrate, the circuits differ as to the basis for imposing employer liability for Title VII hostile work environment arising from sexual harassment perpetrated by a supervisor. In some circuits the employer is released from all liability where the employer takes steps to halt or negate the harassment. In other circuits the employer is insulated from liability where the employer has adopted a comprehensive anti-discrimination policy which is actively enforced. Yet other circuits impose liability only in situations where the supervisor exercised actual authority in the harassment. None, however, have taken the extreme position adopted by the Tenth Circuit to impose liability on the employer where the supervisor was, in any way, assisted in the accomplishment of the tort by the employment relationship. This Court needs to grant certiorari in order to provide a definitive rule of law that can be uniformly applied as the basis of employer liability or, at the very minimum, address the issue so that the various courts of appeals are afforded more guidance on the issue.

III.

THE TENTH CIRCUIT'S DECISION AND THE CONFLICT AMONG THE CIRCUITS ON A MAJOR ASPECT OF FEDERAL EMPLOYMENT LAW WARRANTS THE GRANTING OF A WRIT.

The implementation of the laudable goals of Title VII are of paramount importance. The effect Title VII has on employment throughout this country cannot be underestimated. Consistency is a recurring principle in the employment arena. Uniformity of federal law, as it affects the work place, is likewise critical for both the

employer and employees. Both, employers and employees need an expectation and understanding as to what rules apply. For employers engaged in business throughout the circuits, that expectation should include a uniform application of employment rules under Title VII. It is obvious, an employer can encounter substantial difficulty in trying to implement different work rules dependant upon in which circuit its employees are working. For this reason, this Court should grant a writ.

An object of Title VII is to rid the work place of sexual harassment. A rule of law that undermines that goal is unacceptable. A ruling imposing strict liability, or something closely akin to strict liability, defeats Title VII's goal. Strict liability dampens, if not destroys, an employer's incentive to adopt a policy against sexual harassment, to adopt a grievance procedure and to vigorously enforce that policy to rid the work place of sexual harassment, because there is no real incentive to adopt a policy, train the employees or enforce the policy due to the fact the employer will still be liable. While one might argue strict liability might have the opposite effect, that is not what Congress thought when Title VII was enacted and certainly not what this Court thought in *Meritor.* Also, as it now stands, with the conflict among the circuits, Title VII objectives are not being accomplished and incentive for employers to take action to ensure a harassment-free work environment exists is being undermined by the disparity between the circuits, such as the Tenth Circuit's decision in this case.

Title VII affects every person in the work force today, employees and employers alike. The work force in the United States represents a substantial segment of the population in this country. An issue pertaining to Title VII and its application in the work place is, therefore, an issue of interest to millions of people. An issue affecting a substantial segment of our society is a basis for granting a writ of certiorari. *Patterson v. Lamb*, 329 U.S. 539, 541 (1947). This Court must grant certiorari to decide the crucial issue of the standard to which employers are to be held for sexual harassment in violation of Title VII committed by supervisors acting outside the scope of their employment.

PART II

REASONS FOR GRANTING THE WRIT OF CERTIORARI ON THE ISSUE OF WHETHER GRIEVANCE/ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS COMPEL AN EMPLOYEE TO ARBITRATE A STATUTORY EMPLOYMENT DISCRIMINATION CLAIM

The issue of whether an employee who is subject to a CBA is bound to arbitrate a federal statutory employment discrimination claim presents several reasons for granting a writ. They are:

1. In light of this Court's decisions in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and the precedent established by those cases favoring enforcement of arbitration agreements, there exists a major question as to whether this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), has, in effect, been seriously eroded or completely overruled. The uncertainty as to whether *Alexander v. Gardner-Denver Co.* is still applicable can only be answered by this Court.

2. There exists conflict between the circuits as to whether the grievance/arbitration process in the CBA bars suit by an employee for an individual statutory discrimination claim.

3. This is an issue of major importance involving national labor policy. There exists a public policy question as to whether courts should carve out CBAs as an exception to their sanctioning of arbitration of statutory claims through the use of arbitration. The issue is whether the enforceability of an agreement to arbitrate an individual's statutory discrimination claims should likewise be extended to the collective bargaining arena. Because of the size of

the work force potentially affected and the number of cases that are arising in the courts throughout the United States, there also exists a question of judicial economy and administration of the courts.

I.

THE DECISIONS OF THIS COURT HAVE SANCTIONED THE ENFORCEABILITY OF A VOLUNTARY AGREEMENT TO ARBITRATE STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS. THE UNCERTAINTY CREATED BY THE LANGUAGE IN *GILMER v. INTERSTATE/JOHNSON LANE CORP.* AS TO THE CONTINUED VIABILITY OF *ALEXANDER v. GARDNER-DENVER CO.* NEEDS TO BE LAID TO REST. VOLUNTARY AGREEMENTS TO ARBITRATE AN INDIVIDUAL'S STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS THROUGH THE GRIEVANCE/ARBITRATION PROCESS ARE ENFORCEABLE.

A. Federal Labor Policy

For many years, federal labor law has expressed approval of arbitration to settle disputes in the work place that arise under the context of a CBA. This was first established under the Steel Workers Trilogy: *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steel Workers of America v. Warrior and Gulf Navigator Co.*, 363 U.S. 574 (1960); *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). As a part of that policy, employees have to exhaust the grievance and arbitration process contained in the CBA before they can initiate a law suit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Concurrently, the union has a duty to insure its members' grievances are adequately pursued. If the union fails in its duty to fairly represent the employee in the grievance/ arbitration process, that employee has redress by means of suit

under 29 U.S.C. § 185. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), *also see Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Also, where a union intentionally fails to pursue a Title VII claim because of the possible difficulty in pursuing the claim and the possible resentment pursuit of that claim might cause, the aggrieved employee also has a cause of action against the union under Title VII and 42 U.S.C. § 1981. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987). With the well-established body of federal labor law favoring arbitration, the question which has arisen is whether an employee's federal statutory claims involving discrimination are subject to having to be exhausted through the CBA's grievance/arbitration provisions before the aggrieved employee may seek redress in the courts. Federal law, as it has developed, reinforces deferral to arbitration to settle employees' work-related disputes.

Under traditional federal labor law, as contained in the National Labor Relations Act, 29 U.S.C. § 159, the unions have the authority to negotiate the terms of employment for their members. The authority vested in the unions acts to bar the individual employee from bargaining with the employer over that employee's individual rights. *General Electric Co.*, 150 NLRB 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). The authority granted the union encompasses an expansive number of issues involving the employee's terms of employment. In that bargaining process, the union may waive individual rights of its members to gain other benefits for those members. A classic example is bargaining away certain rights, such as the right to strike, for the benefit of a right to arbitrate disputes arising under the terms of the CBA. The Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996), saw no difference between bargaining away the right to strike and bargaining for the right to arbitrate. The *Austin* court, quoting *Gilmer*, said:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the

> statute; it only submits to their resolution in an arbitral, rather than a judicial forum. . . . [*citations omitted*]
>
> *Gilmer* thus rejects the principal concern in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. . . .
>
> Emphasizing its support of arbitration as a method of dispute resolution, the *Gilmer* Court stated:
>
> > [A]ttacks on [the adequacy] of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Austin, 78 F.3d at 880.

In summary, traditional federal labor law has allowed a union to represent its members in matters involving their individual rights. Unions have the right to bargain away those rights to gain other advantages for its members. If the union fails in its obligation to protect and fairly represent a member, that member has redress against the union in the courts. *Vaca v. Sipes, supra.* With regard to an employee's individual rights to seek redress for employment discrimination claims, there is no valid reason to carve out an exception to traditional federal labor policy favoring arbitration.

This is particularly true with the fading suspicion of arbitration as a valid method of settling disputes. This Court has acknowledged this reality in *Mitsubishi* by stating "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternate means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-627. In reality, the issue boils down to one of choice of forum for relief. If there is no valid reason to hold the arbitration process suspect, there exists no valid reason to hold the grievance/arbitration clauses in CBAs unenforceable as to the individual employee's employment discrimination claims.

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), first established the law regarding the question of enforceability of the grievance/arbitration process in CBAs as to an individual employee's federal statutory employment discrimination claims. The *Alexander* Court held an employee who submitted a Title VII claim to a final and binding arbitration pursuant to a non-discrimination clause in a CBA was not bound by the arbitrator's adverse decision, but was entitled to a *de novo* hearing in federal court on his Title VII claim. To a major extent, the decision was based upon the then long standing suspicion of arbitration as a proper and viable alternative to settle individuals' statutory claims, which had traditionally been settled in the courtroom. In the two decades following *Alexander v. Gardner–Denver*, the law has continued to develop and change regarding the public policy of allowing arbitration as an alternative to settle disputes involving an individual's statutory employment discrimination claims rather than that individual only being able to seek relief in the courts. This Court's steps in that evolutionary process are reflected by decisions beginning in the mid-to-late 1980s, when a series of cases arose in which this Court held that various individual statutory claims were subject to compulsory arbitration. *Rodriguez de Quijas v. Shearson/ American Express, Inc., supra, Shearson/American Express, Inc. v. McMahon, supra,* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra.* While none of these cases directly dealt with a CBA, they initiated a trend by this Court to

reverse the long-standing reluctance to approve arbitration of individual statutory employment claims which had traditionally been decided in courts and to apply the provisions of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, to various types of commercial contracts containing arbitration provisions. As a rationale, this Court said in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by statute; it only submits to the resolution in an arbitral, rather than judicial, forum." *Mitsubishi*, 473 U.S. at 628. In 1991, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) was decided. *Gilmer* laid to rest any doubts concerning the propriety of arbitration as a mechanism for resolution of federal employment discrimination claims and the traditional wariness of the courts towards the arbitral process.

> The court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), also expressed the view that the arbitration was inferior to the judicial process for resolving statutory claims. *Id.* at 57-58, 94 S. Ct. at 1024-1025. That meant that "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. *McMahon*, 482 U.S. at 231, 232, 107 S. Ct. at 2340. "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of the arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985).

Gilmer, 500 U.S. at 344 (footnote 5). Under the provisions of the FAA, this Court enforced an arbitration clause in the context of a Title VII claim. This Court indicated that the arbitration

agreements must be enforced unless the party resisting arbitration can prove that Congress intended to preclude a waiver of judicial forum for this statutory claim. *Gilmer*, 500 U.S. at 26. The *Gilmer* court concluded that there existed nothing in the text of the statute, the legislative history of the statute, or the underlying purposes of ADA to reflect a congressional intent to preclude waiver of statutory claims. This Court indicated it was not overruling *Alexander v. Gardner-Denver* or its progeny. However, the language in *Gilmer* clearly signaled a dramatic departure from the Court's earlier suspicion of the arbitral process. As the Seventh Circuit has said in *Tractor Supply Co., Inc. v. Pryner*, 109 F.3d 354 (7th Cir. 1997): "[t]he court [United States Supreme Court] may have so distinguished *Alexander* as to deprive it of any authoritative force; . . ." (bracketed material added). The *Gilmer* case likewise indicated that there was nothing in the text of Title VII or its legislative history or the underlying purpose that would preclude alternative dispute resolution for Title VII claims.

The uncertainty as to the continued viability of *Alexander v. Gardner-Denver* is further accentuated by Congress in the Civil Rights Act of 1991 (which was passed approximately five months after this Court decided *Gilmer*) and the Americans with Disabilities Act of 1990. (Pub. Law No. 102-166, § 118, 105 Stat. 1071, 1081 (1991), 42 U.S.C. § 12212). Congress has encouraged the use of arbitration to resolve statutory employment discrimination claims. In its amendment to the Civil Rights Act of 1991 Congress stated:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

The Americans with Disabilities Act contains the exact same language.

B. Conflict in the Circuits and the District Courts

Since the *Gilmer* opinion, various Circuit Courts of Appeal have struggled with the issue of arbitration clauses in CBAs as they pertain to an individual employee's federal statutory discrimination claims. In this case, the Tenth Circuit held Harrison did not have to exhaust her remedies under the CBA's grievance and arbitration process before seeking redress in the court. The court relied upon *Alexander v. Gardner-Denver* as being "[t]he seminal decision concerning the 'proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's right to equal employment opportunities under Title VII.' " The Tenth Circuit considered *Alexander v. Gardner-Denver* to still be controlling. The Tenth Circuit placed itself in direct contradiction with the Fourth Circuit in its decision in *Austin.*

In *Austin v. Owens-Brockway Glass Container, Inc., supra,* the Fourth Circuit ruled that the mandatory grievance/arbitration clauses contained in CBAs to be enforceable as to an employee who is a union member. That employee must submit his or her Title VII or ADA claims to binding arbitration. The Fourth Circuit's decision rests on an analysis of this Court's decisions regarding arbitration of an individual's employment discrimination statutory claims in cases arising since *Alexander v. Gardner-Denver.* The Fourth Circuit has determined that in reality this Court has overruled *Alexander v. Gardner-Denver.* The Fourth Circuit rejected the concept that a union under its duty to fairly represent cannot adequately represent the aggrieved employee. The Fourth Circuit also recognized that the aggrieved employee had a right of redress against the union if the union fails to fairly represent. *Vaca v. Sipes, supra.* In virtually all other areas of protecting the individual employee's rights under a CBA, the courts have relied upon the union to protect those substantive rights. There is no valid distinction between those substantive rights the union is allowed to protect in the arbitration process and an employee's individual statutory rights against employment discrimination. If the union does not adequately protect

those rights, then the same redress against the union is available as in all other situations where the union fails in its duty to fairly represent.

On March 20, 1997, in *Tractor Supply Company, Inc. v. Pryner*, 109 F.3d 354 (7th Cir. 1997), the Seventh Circuit held an individual employee cannot be compelled to arbitrate his statutory employment discrimination claims. In so holding, the Seventh Circuit acknowledged the split among the circuits on this issue by pointing to *Austin v. Owens-Brockway Glass Container, Inc., supra*, and the opposite result reached by the Eighth Circuit in *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996). The court addressed the issue concerning the *Gilmer* decision's affect on *Alexander v. Gardner-Denver:*

> On balance, our case is closer to *Alexander* [than *Gilmer*], but is enough left of *Alexander* [after *Gilmer*] to compel a decision in favor of the plaintiffs? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996), cert. granted, 117 S. Ct. 941 (1997). The conservative reading of *Gilmer* is that it just pruned some dicta from *Alexander* — and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights. That issue was not before the court or discussed by it. The court may have so distinguished *Alexander* as to deprive it of any authoritative force; but that is the most it did and by doing so opened what till then had been a closed issue.

The Seventh Circuit is clearly pointing to a critical need for

this Court to grant a writ to resolve whether *Alexander v. Gardner-Denver* is still viable or whether *Gilmer* has for all practical purposes overruled it. By making that determination, this Court will also resolve the split of authority between the circuits and the growing split of authority that is arising within the district courts in the various circuits.[4]

Labor unions, employers and union member employees must have guidance from this Court as to whether the grievance/arbitration provisions in a CBA which compel arbitration of statutory claims under Title VII will be enforced. This Court must grant certiorari on this issue to resolve the conflict between the circuits on this issue. This issue is being faced by all the circuits with increasing frequency and this is a matter of extreme importance that this Court resolve. Presently, a Petition for Writ of Certiorari is pending with this Court on this same issue in the case of *Tractor Supply Company, Inc. v. Vincent L. Pryner* from the Seventh Circuit.

C. The issue is one of choice of forum and judicial economy.

Once this Court is satisfied that substantively arbitration can provide adequate protection and remedy to an aggrieved employee on that employee's federal statutory discrimination claims, the issue becomes one of choice of forum in which the claim may be resolved. This Court has previously sat itself that arbitration can provide adequate substantive protections and remedies to an employee. In *Mitsubishi*, this Court stated: "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than judicial, forum." *Mitsubishi*, 473 U.S. at 628. The court further reasoned: "[i]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of

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4. The *Tractor Supply Company, Inc. v. Pryner* case is presently before this Court on Petition for Writ of Certiorari. The petition for the writ is a well-reasoned analysis with many valid and cogent reasons for this Court to grant a writ on this issue.

the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 473 U.S. at 628. The *Mitsubishi* court also stated: "[s]o long as the prospective litigant effectively may vindicate its statutory action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions" *Mitsubishi*, 473 U.S. at 637.

Certiorari should be granted because this issue has become "[a] most troublesome question in the administration of justice." *Linkletter v. Walker*, 381 U.S. 618, 620 (1965).

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted as to all issues.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MAY 8, 1997

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-2045

JEANNE HARRISON,

Plaintiff-Counter-Defendant-Appellant,

v.

EDDY POTASH, INC., A New Mexico Corporation; ROBERT L. BROWN,

Defendants-Counter-Claimants-Appellees.

No. 96-2065

JEANNE HARRISON,

Plaintiff-Counter-Defendant-Appellee,

v.

EDDY POTASH, INC., a New Mexico corporation,

Defendant-Counter-Claimant Appellant.

and

ROBERT L. BROWN,

Defendant-Counter-Claimant.

Appendix A

Appeal from United States District Court
for the District. of New Mexico
(D.C. No. CIV-94-691-JP)

Floyd D. Wilson (Richard D. Barish with him on the brief), of Wilson & Pryor, P.C., Albuquerque, New Mexico, for the plaintiff-counter-defendant-appellant.

W.T. Martin, Jr. (Stephen S. Shanor with him on the brief), of Law Offices of W.T. Martin, Jr., P.A., Carlsbad, New Mexico, for the defendant-counter-claimant-appellee.

Before BRISCOE, McWILLIAMS, and LUCERO, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff Jeanne Harrison brought this action under Title VII of the Civil Rights Act of 1964, alleging hostile work environment sexual harassment as well as various pendent state law claims against her supervisor and her employer. A jury returned a verdict in favor of plaintiff and against her supervisor on claims of intentional infliction of emotional distress and battery, awarding compensatory damages of $102,500 and punitive damages of $40,000, but found against plaintiff and in favor of her employer on her Title VII claim. Plaintiff appeals the verdict with respect to her Title VII claim, contending the district court erroneously instructed the jury as to the requirements for imposing liability on the employer. The employer has filed a cross-appeal, claiming the court was without jurisdiction to entertain plaintiff's Title VII claim because plaintiff failed to comply with the grievance procedures set forth in her union's collective bargaining agreement. With respect to

plaintiff's appeal, we reverse and remand for further proceedings. As for the employer's cross-appeal, we conclude the court had jurisdiction over plaintiff's Title VII claim and affirm.

I.

Plaintiff is a resident of Carlsbad, New Mexico. Defendant Eddy Potash, Inc., is a New Mexico corporation doing business in Eddy County, New Mexico. Defendant Robert L. Brown is a supervisor employed by Potash. Plaintiff began working for Potash as an underground potash miner in May 1992 and was the only female working with a crew of approximately 30 men. Brown, who worked as the underground shift foreman, was plaintiff's supervisor and was in charge of delegating duties and assigning work to plaintiff. According to plaintiff, Brown was the first person she was required to call if she was sick or wanted to take vacation. Brown was also involved in the disciplinary process.

The miners at Potash had a "buddy system" where each miner was assigned a "buddy" and each set of "buddies" worked together in a section of the mine away from other members of his or her crew. If a miner was not assigned a "buddy" on a particular shift, he or she was designated the "extra person" and was typically assigned to perform miscellaneous duties.

On May 4, 1993, Brown approached plaintiff in an isolated portion of the mine and attempted to kiss her on the mouth. She "pushed him away and told him he was crazy and to get the hell out of there." Append. I at 73. On the following day, Brown ordered plaintiff to leave her work station and accompany him to an abandoned unlit section of the mine to look for empty oil

barrels he had allegedly previously noticed. After driving around the mine for awhile, Brown stopped the vehicle and walked around to the side where plaintiff was sitting. He tried to kiss plaintiff, to put his hands on her breasts and between her legs, and to unzip her pants. At the same time, Brown made various sexually suggestive comments to plaintiff, including asking her if she wanted to have intercourse or oral sex. Plaintiff pushed Brown away and said "No" to each question. Brown "unbuttoned his pants and exposed his penis, put [plaintiff's] hand on his penis, and he ejaculated." Append. I at 76. Brown then drove plaintiff back to the section of the mine where she normally worked.

On May 15, 1993, plaintiff was working with her "buddy" to fix a broken machine. Brown arrived where they were working and ordered plaintiff to accompany him to the shop to look for a part for the machine. Before arriving at the shop, Brown stopped the vehicle in an unoccupied section of the mine, walked around to plaintiff's side of the vehicle, and again attempted to kiss her, to touch her, and to unzip her pants. Plaintiff repeatedly told Brown "No." Brown started walking back to his side of the vehicle, but turned around and returned to where plaintiff was sitting. He unzipped his pants and said, " 'Well, at least I can be happy.' " Append. I at 81. He then forced plaintiff to masturbate him. Brown then drove plaintiff to the shop and ordered the mechanic to drive her back to where she had been working.

On May 24, 1993, plaintiff was working a "graveyard" shift and was designated as the "extra person." Brown ordered her to accompany him to a section of the mine where they were experiencing a high methane gas reading, stating they needed to check the readings and make sure the section had been curtained off correctly. After they completed the work described,

Brown drove to a nearby section of the mine that was unoccupied, unlit, and had a low ceiling. As in the previous incidents, Brown walked around to plaintiff's side of the vehicle and attempted to kiss her, touch her, and unzip her pants. He also made various sexually suggestive comments. Plaintiff again told him "No" and attempted to push him away. Ultimately, Brown exposed himself and forced plaintiff to masturbate him.

On June 7, 1993, Brown ordered plaintiff to clean up around the shifter's office. After she had finished, Brown ordered her to accompany him in taking a load of materials to a section of the mine. On the way, Brown stopped the vehicle at an old unoccupied section of the mine and told plaintiff, "Look, I made us a bed out of [burlap] cloth." Append. I at 91. Brown asked plaintiff to lie down with him and she did. Brown repeatedly asked her to have sex with him and attempted to kiss and touch her, but plaintiff said "No." Brown then forced plaintiff to masturbate him.

During the period of time in which the incidents took place, plaintiff was aware of rumors indicating Brown was going to replace Larry Robertson, who was retiring in the safety office. The safety office was located on the surface and plaintiff believed if Brown went to that position she would not be in contact with him or under his supervision. However, when plaintiff returned to work on June 21, 1993, after a three-day break, she learned Brown would not be replacing Robertson. At that point, she knew the "problem wasn't going to go away," and she "was going to have to do something to put an end to it." Append. I at 94. However, she was scared that no one in management would believe her and that she would lose her job.

On June 26, 1993, plaintiff arrived at work and learned her

usual "buddy" had been assigned to work with another miner and she was the "extra person." Afraid Brown would again attempt to harass her, she completed a few of her assigned tasks and told Brown she was sick and was going home.

On June 27, 1993, plaintiff was again designated the "extra person." Brown ordered her to accompany him to shovel some tunnels in the mine. When they arrived, Brown again began harassing her in the identical manner as in the previous incidents. Plaintiff refused his advances and refused to masturbate him. Brown drove plaintiff back to his office and told her to go to her machine and work through lunch. Later that same day, Brown ordered plaintiff to help him clean his office. When they were alone, he again began harassing plaintiff, touching her, and repeatedly asking her to have sex. Plaintiff refused Brown's advances.

On June 28, 1993, plaintiff called the line foreman and told him she was having some problems and needed to take some vacation days to finish out the remainder of her eleven-day shift. On her next scheduled work day (July 5, 1993), plaintiff called in sick. She also called in sick the following day.

On July 7, 1993, plaintiff called Dale Janway, a manager in the safety office, and told him what had happened with Brown. Janway told plaintiff "this is pretty big," and he would have to talk with Ken Leivo, the human resources manager. Append. I at 101. Later that afternoon, Leivo telephoned plaintiff and informed her she would be on administrative leave pending the outcome of his investigation. Leivo also asked plaintiff to prepare a written statement outlining what had happened. Plaintiff and Leivo talked on the telephone several times between July 7 and July 12. Leivo told plaintiff that Brown had admitted everything but said the incidents were consensual.

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On July 14, 1993, Leivo issued a three-page "Determination and Disposition," noting plaintiff's and Brown's versions of what happened were substantially similar, with the exception that Brown alleged the encounters were consensual. The document stated in pertinent part:

> The absence of any evidence to the contrary, and Ms. Harrison's own testimony, as well as that of Don Frazier [plaintiff's therapist], make Mr. Brown's stated view of the relationship believable. Therefore, it is my determination that Mr. Brown did not knowingly engage in illegal harassment of Ms. Harrison.
>
> Nevertheless, because of Mr. Brown's position as Ms. Harrison's supervisor and the authority and intimidation possibilities inherent in that position, it is also my determination that Ms. Harrison's participation in the relationship was truly unwilling and that the situation did cause Ms. Harrison great mental stress. Her fear of the possibility of losing her job if she filed a complaint, while not necessarily well-founded, was understandably very real to her.
>
> Furthermore, Mr. Brown's involvement in this activity in the work environment reflects, at the least, extremely poor judgment on his part. This kind of activity certainly cannot be deemed acceptable by the Company nor can any future activity of this nature be

> tolerated by Mr. Brown or any other supervisor or employee.
>
> Because it is impossible to prove the actual nature and extent of this relationship, and because there is no incontrovertible truth available as to the motivations, feelings, and roles of the parties involved, it is determined that no absolute justice may be possible in the resolution of this matter.
>
> Therefore, after due and deliberate consideration of all possible alternatives available, it is determined that the Company can only take such actions in this case as appear warranted to assure prevention of any continuation or recurrence of the relationship between the parties involved. Additionally, the Company must accept a moral obligation to assure that Ms. Harrison suffers no monetary loss due to this situation and that any emotional problems found resultant of this situation are properly addressed.

Append. III at 405. In conclusion, the document indicated that plaintiff would be "made whole for all work time lost as a result of the matter," that she would be provided with counseling services and necessary medical treatment and prescription drugs, that she would be moved to a different crew in the mine, that Brown would be formally reprimanded for his involvement in the incident, that Brown would "be placed on permanent probation for any future activity of this type," and that Brown would be ordered to have no contact with plaintiff "other than

that which might be absolutely necessary as part of his required duties." *Id.* at 405-06.

Although plaintiff remained on the Potash payroll for approximately one year, she never returned to work. On June 17, 1994, her employment was terminated due to a reduction in force at the mine.

At the time of the described incidents, Potash had in place an official policy against sexual harassment. Plaintiff first became aware of the policy after several of the incidents with Brown had occurred. Specifically, she happened to be working in a different section of the mine than where she normally worked and noticed a copy of the policy posted on that shop's bulletin board. After seeing it, she went home and looked through the materials she was given on her first day of work, but there was no mention of the policy in those materials.

II.

Plaintiff's appeal

Plaintiff contends the district court erred in instructing the jury on the requirements for imposing Title VII liability on Potash for the hostile work environment sexual harassment committed by Brown. More specifically, she contends the instructions (1) improperly combined two discrete bases for employer liability under title VII, (2) incorrectly informed the jury that Brown had to have a high degree of control over plaintiff in order to impose liability on Potash, and (3) incorrectly defined the term "apparent authority." Plaintiff further contends the court erred in rejecting three of her proposed instructions concerning an employer's liability under Title VII for actions of its supervisors.

We review a district court's decision on jury instructions, i.e., whether to give a particular instruction, for abuse of discretion. *Allen v. Minnstar*, 97 F.3d 1365, 1368 (10th Cir. 1996). As for the instructions themselves, we conduct a de novo review to determine whether, as a whole, they correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards. *Id.; see also Gardetto v. Mason*, 100 F.3d 803, 816 (10th Cir. 1996). "Reversal is warranted only where a deficient jury instruction is prejudicial." *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995).

Because all of plaintiff's arguments on appeal focus on whether the district court correctly instructed the jury with respect to the issue of employer liability under Title VII, we begin by reviewing generally when an employer can be held liable under Title VII for hostile work environment sexual harassment committed by a supervisor.

Title VII prohibits an employer from discriminating against an employee on the basis of sex with respect to "compensation, terms, conditions, or privileges" of employment. 42 U.S.C § 2000e-2(a)(1). It is well established that this prohibition encompasses sexual harassment in the workplace. *Ball v. Renner*, 54 F.3d 664, 665 n. 2 (10th Cir. 1995) ("Title VII's prohibition against sex discrimination includes a ban on sexual harassment"); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 575 (10th Cir. 1990); *Hicks v. Gates Rubber Co*, 833 F.2d 1406, 1413 (10th Cir. 1987) ("Sexual harassment . . . is now universally recognized as employment discrimination within the meaning of Title VII.").

For analytical purposes, courts have created two

"categories" of sexual harassment. The first, quid pro quo harassment, occurs "where specific benefits of employment are conditioned on sexual demands" by the victim's supervisor. *Ball*, 54 F.3d at 665 n. 2. The second, hostile environment harassment, occurs "where [a supervisor's or co-worker's sexual] conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)); *see also Winsor v. Hinckley Dodge*, 79 F.3d 996, 1000 (10th Cir. 1996) (defining hostile environment harassment).

Although the distinction between quid pro quo harassment (which is always perpetrated by a supervisor) and hostile work environment harassment perpetrated by a supervisor is often blurred, courts have typically treated the two categories of harassment differently in terms of imposing liability on the employer. In cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is "strictly liable" for the supervisor's wrongful conduct *See, e g., Pierce v. Commonwealth Life Ins Co.*, 40 F.3d 796, 803 (6th Cir 1994); *Virgo v. Riviera Beach Associates. Ltd.*, 30 F.3d 1350, 1363 n. 9 (11th Cir 1994); *Karibian v Columbia University*, 14 F.3d 773, 777 (2d Cir.) ("Because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment — either actually or apparently — the law imposes strict liability on the employer for *quid pro quo* harassment."), *cert. denied* 512 U.S. 1213 (1994). Presumably, this imposition of "strict liability" rests upon the fact that the supervisor was acting within the scope of his actual or apparent authority when he committed the harassment, *see* Restatement (Second) of Agency § 219 (1) and (2)(d) (1958),

or because the supervisor "was aided in accomplishing the [harassment] by the existence of the agency relation." *Id.* § 219(2)(d).

In cases involving hostile work environment sexual harassment, the requirements for imposing liability on the employer are murkier. In 1986, the Supreme Court confirmed in *Meritor* that hostile work environment sexual harassment violates Title VII, but declined to specifically outline the requirements for imposing liability on an employer when a plaintiff alleges such harassment. In dicta, the Court stated:

> [W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

477 U.S. at 72.

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Because the issues raised by plaintiff require us to go beyond *Meritor* and determine the precise requirements for imposing liability on an employer for hostile work environment sexual harassment, we turn (as directed by the Supreme Court in *Meritor*) to principles of basic agency law. Restatement (Second) of Agency § 219 provides that a master is liable for the torts of his servants under the following circumstances:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

In our first post-*Meritor* case involving employer liability for hostile work environment sexual harassment, we identified three of the above-quoted sections as possible bases for employer liability. *Hicks*, 833 F.2d at 1418. Specifically, we identified (1), (2)(b), and (2)(d) as possible bases. These sections will be discussed in order.

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Section 219(1) has been cited by some courts and commentators as a legitimate basis for imposing liability on an employer for a supervisor's hostile work environment harassment (at least in certain circumstances). *See* Oppenheimer, *Exasperating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors.* 81 Cornell L. Rev. 66, 142 (Nov. 1995). However, we have concluded § 219(1) is rarely applicable in hostile work environment cases because " '[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business' " *Hicks*, 833 F. 2d at 1417-18 (quoting Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims after Meritor Savings Bank v. Vinson,* 31 St. Louis U.L.J. 239, 276 (1987)); *see also* Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for* a *Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057, 1073 (May 1995) (concluding "respondeat superior analysis [under § 219(1)] is a poor vehicle for finding employer liability for a supervisor's hostile work environment sexual harassment").

Section 219(2)(b) imposes liability on an employer for "negligence or recklessness in failing to respond to hostile work environment sexual harassment by employees." *Hirschfeld,* 916 F.2d at 577. Under this theory of employer liability, the plaintiff must establish "that the employer had actual or constructive knowledge of the hostile work environment," but "did not adequately respond to notice of the harassment." 48 Vand. L. Rev. at 1080. Generally speaking, an employer will not be charged with constructive knowledge of the harassment merely because a supervisor is the perpetrator of the harassment. *See* Restatement (Second) of Agency § 282(1) (1958).

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Section 219(2)(d) contains two separate clauses, each of which can provide a basis for imposing liability on an employer. The first clause provides an employer will be liable if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority." To recover, a plaintiff "must show that the employer manifested in [the supervisor] the authority to act on its behalf, that such manifestation resulted in harm to the plaintiff, and that the plaintiff acted or relied on the apparent authority in some way." 48 Vand. Rev. at 1087. The first element is established "[w]henever an employer vests its supervisor with the authority to control significant aspects of the work environment." *Id.* at 1089. The second element is satisfied by demonstrating the supervisor subjected plaintiff to sexual harassment. The third element (that plaintiff acted or relied on the apparent authority of her supervisor) is the most difficult to prove and will often hinge upon whether the employer has a formal policy against sexual harassment. *Id.* "When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job." *Id.* at 1090. In contrast, if an employer has taken steps "to remove any possible inference that a supervisor has authority to sexually harass his subordinates," the victim is likely aware the harassment is not authorized and reliance on apparent authority will be difficult to establish. *Id.*

The second clause of § 219(2)(d) provides an employer will be liable if the servant "was aided in accomplishing the tort by the existence of the agency relation." Despite the straightforward wording of this clause, there is disagreement over how to interpret and apply it in the context of Title VII sexual harassment cases. Some courts and commentators interpret the clause to mean an employer will be liable if it "delegates the authority to

control the work environment to a supervisor who then abuses that delegated authority." 48 Vand. L. Rev. at 1091. This interpretation acknowledges that, "[e]ven if an employer successfully negates any apparent authority the supervisor might have had to commit sexual harassment, a supervisor still holds actual power over his subordinates in the workplace." *Id.* Accordingly, if the supervisor "is able to misuse that power to create a hostile work environment, the employer will be liable for having placed him in the position to do so." *Id.* In *Karibian,* the Second Circuit interpreted the second clause of § 219(2)(d) in this manner and held that, "regardless of the absence of notice or the reasonableness of [the employer's] complaint procedures," an employer is liable for a supervisor's hostile work environment harassment if the supervisor was "aided in accomplishing the harassment by the existence of the agency relationship." 14 F.3d at 780. Applying these principles to the facts before it, the court stated:

> The essence of [plaintiff's] hostile work environment claim is that her supervisor capitalized upon his authority over her employment to force her to endure a prolonged, violent and demeaning sexual relationship. If the factfinder accepts [plaintiff's] allegations, [the employer] is liable to [plaintiff] because [the supervisor] abused his delegated authority to create a discriminatorily abusive work environment.

Id.; *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (continuing to apply this approach).

Other courts have adopted a narrower view of the second clause of § 219(2)(d).

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Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, 116 S.Ct. 569 (1995); *see also Bouton v. BMW of North America*, 29 F.3d 103, 108 (3d Cir. 1994). In *Gary*, the court outlined its view of the second clause of § 219(2) (d):

> In a sense, a supervisor is always "aided in accomplishing the tort by the existence of the agency" because his responsibilities provide proximity to, and regular contact with, the victim. As Judge MacKinnon noted some years ago, however, such a reading of section 219(2)(d) "argue[s] too much." The commentary to the Restatement suggests that this exception embraces a narrower concept that holds the employer liable only if the tort was "accomplished by an instrumentality, or through conduct associated with the agency status." Thus a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message, as may the undisclosed principal of a store whose manager cheats a customer. In such cases, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him."

55 F.3d at 1397 (internal citations omitted). Based upon this reading of the second clause of § 219(2)(d), the court concluded:

> [A]n employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences. . . . While a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations.

Id. at 1398.

The problem we see with the District of Columbia Circuit's interpretation is that it effectively merges the first and second clauses of § 219(2)(d). Stated differently, we believe this reading of the second clause requires a plaintiff to prove the same factors as under the first clause — that the supervisor was acting with apparent authority, that the supervisor subjected plaintiff to sexual harassment, and that she reasonably relied on the supervisor's apparent authority. In so doing, this reading renders the second clause superfluous.

In our view, the better interpretation is that adopted by the Second Circuit in *Karibian*. Compared with the latter interpretation, the *Karibian* approach is more consistent with the language of § 219(2)(d), better suited for cases involving sexual harassment, and the most logical extension of our previous opinions discussing employer liability under Title VII

for sexual harassment. *See Hirschfeld*, 916 F. 2d at 579 (implying liability under second clause of § 219(2)(d) hinges solely on whether harasser used actual authority "to facilitate his harassment," and not upon whether employer had policy against harassment, or whether harasser acted with apparent authority). As previously described, the *Karibian* interpretation allows an employer to be held liable, even if a sexual harassment policy is in place and is made known to plaintiff, where the supervisor uses his actual or apparent authority to aid or facilitate his perpetration of the harassment. We emphasize, however, that this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff. *See Hirschfeld*, 916 F.2d at 579.

In summary, an employer in this circuit can be held liable under Title VII for hostile work environment sexual harassment committed by one of its supervisors if any of the following conditions are met:

1) The supervisor committed the harassment while acting in the scope of his employment. *See* Restatement (Second) of Agency § 219(1). (As previously indicated, this will rarely be a basis for employer liability.)

2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner. See Restatement (Second) of Agency § 219(2)(b).

3) If the employer manifested in the

supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way. *See* Restatement (Second) of Agency § 219(2)(d), clause 1.

4) If the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. *See* Restatement (Second) of Agency § 219(2)(d), clause 2.

Before examining the challenged jury instructions, one final consideration is the effect of this court's holding in *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993). In *Sauers*, plaintiff Debra Sauers was terminated as a secretary in the Salt Lake County Attorney's office in early 1988. Believing she had been the victim of sexual harassment and retaliation, plaintiff initially sought and was denied relief from the Salt Lake County Career Service Council. On April 7, 1988, plaintiff received a right to sue letter from the EEOC informing her she had 90 days in which to file a discrimination action in federal court. Eighty-nine days later, on July 5, 1988, plaintiff filed a pro se complaint under Title VII naming her supervisor. Ted Cannon, and the Salt Lake County Attorney's Office as defendants. After retaining counsel, plaintiff subsequently filed a verified amended complaint on September 29, 1988, naming Salt Lake County and Cannon as defendants. Defendants argued plaintiff's complaint was barred by the statute of limitations because she

did not name her employer as a defendant until after the 90-day period for filing suit had expired. In rejecting this argument, this court noted that " 'the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.' " 1 F.3d at 1125 (quoting *Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir. 1991)). Because plaintiff's pro se complaint had named Cannon as a defendant, and because Cannon could only be sued in his official capacity, the court held the complaint "operated as a suit against Salt Lake County itself," and was therefore timely. *Id.* Continuing, the court held:

> The County may be liable without necessarily knowing of Cannon's actions. "The term 'employer' means a person engaged in an industry affecting commerce . . . and any agent of such a person." 42 U.S.C. § 2000e(b). Unfortunately, "[n]owhere in Title VII is the term 'agent' defined." *Barger v. Kansas*, 630 F. Supp. 88, 89 (D. Kan. 1985). We agree with the Fourth Circuit that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *aff'd in pertinent part*, 900 F.2d 27 (4th Cir. 1990) (en banc). In such a situation, the individual operates as the alter ego of the employer and the employer is liable for the unlawful employment practices of the

> individual without regard to whether the employer knew of the individual's conduct. See 29 C.F.R. § 1604.11(c).

Id. In a footnote to the above-quoted paragraph, the court further stated:

> The employer is not always liable for sexual harassment by its supervisors, *Meritor Savings v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986), but may be liable under the agency principles discussed in *Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572 (10th Cir. 1990). There we determined that employer liability for sexual harassment may attach if the harassers were acting within the scope of their employment, if the employer failed to remedy a hostile environment of which it knew or should have known, or if the harassers acted under apparent authority from the employer or were aided in accomplishing the harassment by their relationship to the employer.

Id. n. 3.

The central question posed by the above-quoted language is whether, as the district court in this case apparently concluded, it imposes an additional requirement that must be met before an employer can be held liable under Title VII for hostile work environment sexual harassment. Specifically, the question is whether a plaintiff must (before establishing employer liability

under §§ 219(1), (2)(b), or (2)(d)) demonstrate the individual harasser is an "agent" as defined in *Sauers:* i.e., that the harasser "serve[d] in a supervisory position and exercise[d] significant control over the plaintiff's hiring, firing or conditions of employment." 1 F.3d at 1125. For the following reasons, we conclude *Sauers* should not be interpreted as imposing such a requirement.

First, the above-quoted language from *Sauers* arose solely in the context of deciding whether the employer (Salt Lake County) had been timely sued. Thus, the "requirement" that the harasser "serve[ ] in a supervisory position and exercise[ ] significant control over the plaintiff's hiring, firing or conditions of employment," applies only when deciding whether the filing of a suit against a harasser (in his official capacity) can operate as a suit against the employer.

Second, there is nothing in the language of Title VII or Restatement of Agency that limits the liability of an employer to harassment perpetrated by an employee who "serve[d] a supervisory position and and significant control over the plaintiff plaintiff's hiring, firing or conditions of employment." Notably, we have never imposed such requirements in any of our post-*Meritor*, pre-*Sauers* opinions (i.e., *Hicks* and *Hirschfeld*). As *Sauers* itself acknowledges, the question of employer liability for the conduct of its employees is determined according to the agency principles referred to in *Meritor* and fleshed out in *Hirschfeld.*

Third, application of the *Sauers* definition of "agent," taken to its extreme, would have the illogical result of shielding employers from liability for harassment committed by low-level

employees. In particular, under the *Sauers* definition an employer would never be liable for harassment committed by low-level supervisors (or any employees who commit peer harassment) because the harasser would not meet the *Sauers* definition of "agent." Clearly, this was not the result intended by Title VII, *Meritor, Hicks,* or *Hirschfeld.*

For all of these reasons, we conclude the discussion in *Sauers* of who constitutes an "agent" for Title VII purposes is strictly limited to situations in which a court is determining whether a claim against a named individual defendant (in his official capacity) can operate as a claim against the employer itself. Where, as here, plaintiff has properly sought Title VII relief directly against her employer, the "agent" definition in *Sauers* simply has no applicability in deciding whether the employer is liable for the conduct of its employees.

We now turn to the challenged jury instructions.

Significant managerial control and apparent authority to commit sexual harassment

Over the objection of plaintiff, the district court instructed the jury as follows regarding Potash's liability under Title VII:

> DETERMINATION OF PLAINTIFF'S CLAIM AS TO DEFENDANT EDDY POTASH, INC. CIVIL RIGHTS ACTS.
>
> If you determine that plaintiff, Jeanne Harrison, has established her prima facie claim of sexual harassment creating a hostile

work environment, then you shall proceed to determine whether plaintiff has established her claim of liability as against the defendant Eddy Potash, Inc.

In order for plaintiff to establish her claim of liability against defendant Eddy Potash, Inc., plaintiff must prove each of the following three elements by a preponderance of the evidence.

FIRST: That the Defendant Robert Brown was the agent of defendant Eddy Potash, Inc.;

SECOND: That the defendant Robert Brown was acting under the apparent authority of Eddy Potash, Inc. in the commission of the acts in question; and

THIRD: That the plaintiff reasonably relied upon such apparent authority.

Append. III at 449-50. The district court further instructed the jury as follows:

AGENCY RELATIONSHIP — DEFINED

In order for you to hold the defendant Eddy Potash, Inc. liable to the plaintiff Jeanne Harrison for the acts of Robert Brown, you must find that Robert Brown was an agent of defendant Eddy Potash, Inc. In order

> to determine whether Robert Brown was an agent of defendant Eddy Potash, Inc., you must find that Robert Brown exercised significant control over plaintiff's hiring, firing or conditions of employment at Eddy Potash, Inc., such that Robert Brown's supervisory position was equivalent to that of managerial control over plaintiff, thereby creating an employer/employee relationship, thus making Robert Brown the alter ego of Eddy Potash, Inc.

Id. at 451. Plaintiff contends these instructions were erroneous because they improperly combined two discrete bases for employer liability under Title VII by instructing the jury that Potash would be liable only if Brown had significant managerial control over plaintiff and if Brown had apparent authority to commit the sexual harassment. According to plaintiff, satisfaction of either one of these requirements is sufficient to impose Title VII liability on Potash. Plaintiff also argues Brown had actual authority to control the conditions of her employment, and this alone would have provided a basis for employer liability had the jury been properly instructed.

Although we do not accept all of plaintiff's arguments, it is without question that the above-quoted instructions failed to properly state the law. The first instruction, which purported to set forth the essential elements for imposing liability on Potash, was incomplete because it only informed the jury about the basis for liability provided in the first clause of § 219(2)(d) (i.e., apparent authority), and ignored the basis for employer liability provided in the second clause of § 219(2)(d) (as noted in greater detail below, plaintiff requested an instruction on the second

clause of § 219(2)(d)). Further, because it was uncontroverted that Brown was an employee of Potash, it is questionable whether the instruction should have required plaintiff to demonstrate that Brown was an agent of Potash. Finally, and most significantly, the second instruction, which purported to define the term "agent," was obviously derived from *Sauers* and is incorrect. For the reasons outlined above in the general discussion of employer liability under Title VII, the *Sauers* definition of "agent" should be used only in deciding whether a suit against an individual employee can operate as a suit against the employer itself. It is not an additional requirement that a Title VII plaintiff must satisfy in order to impose liability on his or her employer. If there was a genuine issue of fact concerning whether Brown was an agent of Potash, then a more general definition of "agent," derived from Restatement (Second) of Agency, should have been used.

Reviewing the challenged instructions in light of the record on appeal. we have no doubt that the instructions were prejudicial to plaintiff. Although the evidence introduced at trial indicated Brown had authority to control significant aspects of plaintiff's day-to day employment, it is without question he was not a member of top-level management. Because the court's "agent" instruction effectively required plaintiff to demonstrate Brown was the "alter ego" of Potash, i.e., a member of top-level management, the instruction effectively prevented her from demonstrating liability on the part of Potash. In addition, the court refused to instruct the jury on the theory of liability provided by the second clause of § 219(2)(d). In light of the evidence introduced at trial, this was clearly a viable basis for imposing liability on Potash.

Appendix A

Defining apparent authority

At trial, the district court instructed the jury on the meaning of "apparent authority":

> APPARENT AUTHORITY — DEFINED
>
> If you find that Robert Brown was an agent of Eddy Potash, Inc. then you must also determine whether Robert Brown was acting with "apparent authority" as an agent of Eddy Potash, Inc.
>
> In this regard you are instructed that an employer, such as Eddy Potash, Inc., may not be liable to an employee for the acts of its agent (supervisor) unless its agent had "authority," whether apparent or otherwise, to commit the acts in question.
>
> In order to determine whether an agent had "apparent authority" you should consider what knowledge the plaintiff had regarding the authority of the agent to commit such acts in question. In this regard you should consider whether the employer had established by a preponderance of the evidence that it had adopted policies against sexual harassment, and had implemented measures such that a victimized employee knew or should have known that the employer did not tolerate such conduct and that she

> could report it to her employer without fear of adverse consequences.

Append. III at 452-53.

On appeal, plaintiff argues "apparent authority" is a confusing technical term that was not adequately explained to the jury by the district court's instruction. Plaintiff further argues the instruction confused actual and apparent authority by telling the jury they should "consider what knowledge the plaintiff had regarding the authority of the agent to commit such acts in question." According to plaintiff, this language directed the jury to examine plaintiff's knowledge concerning Brown's actual authority to assault her. At the very least, plaintiff argues, this language was confusing and did not properly guide the jury in its deliberations. Finally, plaintiff argues the instruction could be construed to mean the existence of a policy against sexual harassment is a complete defense for the employer, which, according to plaintiff, is not an accurate statement of Tenth Circuit law.

We conclude the instruction is flawed in two major respects. First, and most significantly, the instruction informed the jury that Potash could be liable for the acts of Brown only if Brown had authority, apparent or otherwise, to harass plaintiff. This is simply not an accurate statement of the law. Although apparent authority to harass is a necessary requirement for imposing liability on an employer under the first clause of § 219(2)(d), no such authority is needed to establish liability under the second clause of § 219(2)(d). Rather, the fact that the supervisor has actual or apparent authority to control the victim's working environment, and is aided in harassing the victim by that authority, is sufficient to establish employer liability under the second clause of § 219(2)(d).

Second, the instruction did not provide the jury with an accurate definition of the term "apparent authority." Restatement (Second) of Agency § 27 indicates apparent authority "to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." In the comment to that section, it is further noted "there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person." Accordingly, the comment provides that "the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* Here, the challenged instruction wholly failed to inform the jury that any "apparent authority" on the part of Brown would have been created by the "written or spoken words or any other conduct" of Potash. Instead, the jury was led to believe the sole focus of apparent authority was the "knowledge" of plaintiff. The references to plaintiff's "knowledge" should have been deleted; instead, the instruction should have referred to what plaintiff reasonably "believed" based upon the employer's words or conduct.

Although plaintiff complains about the last sentence of the instruction (which discussed whether Potash had implemented a sexual harassment policy), we find nothing wrong with it. As noted in the general discussion of employer liability, if an employer has taken steps "to remove any possible inference that a supervisor has authority to sexually harass his subordinates," 48 Vand. L. Rev. at 1087, the victim is likely aware the harassment is not authorized, and reliance on apparent authority will be difficult to establish. Accordingly, the question of whether the employer established and implemented a policy

against sexual harassment is an important factor in deciding whether apparent authority existed.

Viewing the instructions as a whole, we conclude the flaws in the apparent authority instruction were prejudicial to plaintiff. Although it was uncontroverted that Potash had in place a policy against sexual harassment, there were genuine questions of material fact concerning whether plaintiff had prior knowledge of this policy. Thus, there was at least some basis upon which the jury could have concluded, had they been properly instructed, that Brown had apparent authority to commit the harassment. Moreover, the challenged instruction incorrectly informed the jury that Potash could be liable only if Brown had actual or apparent authority to commit the harassment. Under the second clause of § 219(2)(d), no such authority was necessary.

Employer liability

At trial, plaintiff submitted the following three proposed instructions concerning Potash's liability for the actions of Brown:

> PLAINTIFF'S REQUESTED INSTRUCTION NO. 7
>
> An employer may be held liable for wrongdoing committed by the employer's supervisory employees if certain requirements are met. If you find that Robert L. Brown is liable to Jeanne Harrison, you must decide whether Eddy Potash, Inc. is liable for his wrongdoing.

Appendix A

Eddy Potash, Inc. would be liable if you find by a preponderance of the evidence that one of the following circumstances is true:

First, Eddy Potash would be liable if Robert L. Brown were aided in accomplishing his wrongdoing by the fact that he was an agent of Eddy Potash. That is, Eddy Potash would be liable if the fact that Robert L. Brown was a shift foreman for Eddy Potash helped him to engage in wrongful conduct concerning Jeanne Harrison.

Second, Eddy Potash would be liable if Robert L. Brown had significant supervisory authority over Jeanne Harrison. "Significant supervisory authority" means the authority to hire, fire, discipline, or promote, or at least to participate in or recommend such actions, or the ability to control the conditions of a person's employment.

Eddy Potash can be liable even though what Mr. Brown did violated company policy and even though it took prompt action after it learned of the sexual harassment.

PLAINTIFF'SREQUESTED INSTRUCTION NO. 24

Under 42 U.S.C. § 2000e, an employer is liable for the tort of an employee if the

> employee was aided in accomplishing the tort by the existence of the agency relation.
>
> PLAINTIFF'S REQUESTED INSTRUCTION NO. 25
>
> An employer is liable under Title VII where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.

Append. I at 47-50. The three instructions were rejected by the district court.

On appeal, plaintiff contends the district court abused its discretion in refusing to give the requested instructions. First, relying on the definition of "agent" set forth in *Sauers*, plaintiff contends her proposed instructions 7 and 25 correctly tracked the law in this circuit and provided that Potash would be liable if Brown had the authority to hire, fire, discipline, or promote employees, or at least to participate in such actions. Second, relying on the second clause of § 219(2)(d), and citing *Hicks* and *Hirschfeld*, plaintiff contends proposed instructions 7 and 24 correctly stated the law and provided that Potash would be liable for Brown's harassing conduct if he was aided in accomplishing the harassment by the existence of the agency relation.

Plaintiff's first argument is without merit. For the reasons previously addressed, the definition of "agent" in *Sauers* should

be used only for purposes of determining whether a suit against an individual employee can operate as a suit against the employer. It should not be construed as a requirement plaintiffs must satisfy in order to establish liability on the part of employers. Nor can it be construed (as argued by plaintiff) as setting forth an independent basis for imposing liability on an employer under Title VII for the actions of a supervisor. As the Supreme Court specifically emphasized in *Meritor,* and as this court has since acknowledged, an employer is not strictly liable for hostile work environment sexual harassment committed by one if its supervisors. Plaintiff's proposed interpretation of *Sauers* would produce such a result.

Plaintiff's second argument has greater merit. For the reasons outlined in the general discussion of employer liability, the district court should have given the jury some type of instruction concerning the second clause of § 219 (2)(d). Because the court refused altogether to instruct the jury on the second clause, it abused its discretion.

For the reasons set forth, we conclude the district court's jury instructions on employer liability were erroneous and prejudicial to plaintiff. In addition, we conclude the district court abused its discretion in refusing to instruct the jury on the basis for employer liability provided in the second clause of § 21 9(2)(d). Accordingly, the judgment in favor of Potash and against plaintiff on her Title VII claim is reversed, and the case is remanded to the district court for further proceedings.

Appendix A

III.

Cross-Appeal

During the period of plaintiff's employment, Potash allegedly operated under a Collective Bargaining Agreement (CBA) with Steelworkers Union, Local #177, of which plaintiff was a member. According to Potash, the CBA contained a grievance procedure which plaintiff should have invoked prior to filing suit against Potash. Because plaintiff failed to do so, Potash argues she is barred from pursuing her Title VII claim in federal court.[1]

The seminal decision concerning the "proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII" is *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38 (1974). Harrell Alexander was a black, union-represented employee who had been fired by Gardner-Denver for allegedly producing too many defective or unusable parts. Claiming his discharge was racially motivated, Alexander filed a grievance alleging a violation of the nondiscrimination clause in the collective bargaining agreement between his union and Gardner-Denver. Following the arbitration hearing, the arbitrator denied the grievance without addressing the racial discrimination claim. Alexander then filed a Title VII action in federal district court based upon the same facts alleged in his

1. Potash presented this argument to the district court through a motion to dismiss and for summary judgment. Append. I at 37: Although the court apparently rejected this argument, Potash failed to include a copy of the court's order in the record on appeal. Further, Potash failed to include a copy of the CBA in the record on appeal.

grievance. Gardner-Denver moved to dismiss Alexander's complaint on the grounds of election of remedies and waiver. The district court, later affirmed by the court of appeals, granted summary judgment to Gardner-Denver on the ground that Alexander was bound by the prior adverse decision of the arbitrator. The Supreme Court reversed, concluding Alexander's statutory right to trial under Title VII was not foreclosed by his earlier submission of a discrimination claim to arbitration. "The [*Gardner-Denver*] Court found that in enacting Title VII, Congress had granted individual employees a nonwaivable public law right to equal employment opportunities that was separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 737-38 (1981). In addition, "because Congress had granted aggrieved employees access to the courts, and because contractual grievances and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court concluded that Title VII claims should be resolved by the courts de novo." *Id.* at 738.

Seventeen years later, the Court issued its opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Robert Gilmer was hired by defendant as a manager of financial services. As a condition of his employment, Gilmer was required to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). The NYSE registration application included a provision by which Gilmer agreed to arbitrate any claim which arose between him and defendant and which was required to be arbitrated under exchange rules. NYSE Rule 347 provided for arbitration of any controversy between a registered representative and a member organization arising out of the representative's termination of

employment. Defendant terminated Gilmer's employment in 1987; at the time, Gilmer was 62 years of age. After filing a charge of discrimination with the EEOC, Gilmer filed suit against defendant in federal court alleging violations of the Age Discrimination in Employment Act (ADEA). Defendant moved to compel arbitration of Gilmer's claim and the district court, citing *Alexander,* denied the motion. On appeal, the Fourth Circuit reversed. The Supreme Court then granted certiorari "to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims." 500 U.S. at 24.

Relying on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., the Supreme Court held that Gilmer was obligated to arbitrate his claim that his discharge violated the ADEA. In so holding, the Court rejected Gilmer's arguments that compulsory arbitration of ADEA claims was inconsistent with the statutory framework and purposes of the ADEA. that arbitration would undermine the role of the EEOC in enforcing the ADEA, and that compulsory arbitration deprived claimants of the judicial forum provided by the ADEA. Further, the Court rejected various challenges raised by Gilmer to the adequacy of arbitration procedures. The Court rejected Gilmer's reliance on *Alexander*, specifically concluding *Alexander* and its progeny were factually distinguishable from Gilmer's situation:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather? they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor

> arbitrators were not authorized to resolve such claims. the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally. those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." Therefore. those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

Id. at 35 (internal citation omitted).

Since *Gilmer,* employer/defendants have argued that *Gilmer* effectively overruled *Alexander* and now requires plaintiffs to comply with a collective bargaining agreement's grievance and arbitration procedures prior to filing suit in federal court. To date, only the Fourth Circuit has accepted this argument, *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir.) (affirming grant of summary judgment to employer because plaintiff failed to submit Title VII and ADA claims to mandatory arbitration under collective bargaining agreement), *cert. denied,* 117 S. Ct. 432 (1996), while the majority view is that *Alexander* and its progeny "remain good law and that statutory employment

claims are independent of a collective bargaining agreement's grievance and arbitration procedures." Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 St. Louis U.L.J. 77, 84 (1996); *see, e.g., Varner v. National Super Markets*, 94 F.3d 1209, 1213 (8th Cir. 1996) (holding employee not required to exhaust grievance and arbitration remedies under collective bargaining agreement before bringing suit under Title VII)? *cert. denied*, 117 S.Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995) ("There is nothing in *Gilmer* which appears to throw anything but favorable light upon the continuing authority of [*Alexander* and its progeny]."), *cert. denied*, 116 S. Ct. 1417 (1996); *Bintner v. Burlington Northern*, 857 F. Supp. 1484, 1488 (D. Wyo. 1994) ("There is nothing in *Gilmer* to suggest that the Court abandoned or even reconsidered its efforts to protect individual statutory rights from the give-and-take of the collective-bargaining process."). Although the Tenth Circuit has interpreted *Gilmer* as authorizing compulsory arbitration of Title VII claims, *Metz v. Merrill Lynch, Pierce. Fenner & Smith*, 39 F. 3d 1482, 1487 (10th Cir. 1994) (plaintiff completed securities registration application which contained compulsory arbitration clause), it has never addressed the precise question at issue here (i.e., whether a Title VII plaintiff must comply with a grievance procedure outlined in union's collective bargaining agreement prior to filing suit in federal court against employer).

For the following reasons, we adopt the majority view. The context in which an arbitration clause arises cannot be ignored. In *Alexander*, the clause was contained in a collective bargaining agreement; in *Gilmer*, it was contained in an individual application for registration as a securities dealer. "Nothing in *Gilmer* suggests that the Court abandoned its concern about the inherent conflicts between group goals and individual rights that

exist in the give-and-take of the collective bargaining process." *Randolph v. Cooper Industries*, 879 F. Supp. 518, 521 (W.D. Pa. 1994). Although plaintiffs like the one in *Gilmer* at least have "the theoretical possibility of negotiating a separate deal with their employers" that does not require arbitration, unionized employees have no such choice. 40 St. Louis. U.L.J. at 87. "Any separate deal [they] might negotiate would be void because the union is [their] exclusive bargaining representative." *Id.* "Consequently, . . . the union is restricted to waiving collective rights." *Id.*

An arbitration clause in a collective bargaining agreement (at least historically) implicates only contractual rights under that agreement. *Alexander*, 415 U.S. at 49. Thus, by submitting a grievance, a union employee "seeks to vindicate his contractual right[s]" under the collective bargaining agreement, but does not assert his "independent statutory rights accorded by Congress." *Id.* at 49-50. In contrast, the arbitration clause at issue in *Gilmer* encompassed the employee's statutory rights.[2] 500 U.S. at 23.

There are significant differences between labor arbitration and commercial arbitration. In labor arbitration, the arbitrator is "the proctor of the bargain," and his "task is to effectuate the intent of the parties." *Alexander*, 415 U.S. at 53. Consequently, "[h]is source of authority is the collective bargaining agreement," and he "has no general authority to invoke public laws that conflict with the bargain between the parties." *Id.* In short, he

2. Here, we do not have access to the CBA between Potash and plaintiff's union and therefore do not know what the arbitration clause encompasses. However, there is no indication in Potash's appellate brief that plaintiff's union agreed to arbitrate its members' statutory claims (e.g., Title VII claims).

"is confined to a system of private law, totally outside the system of public law of which employment statutes are a part." 40 St. Louis U.L.J. at 87-88. "In contrast, the employment arbitrator [in commercial arbitration], as envisioned in *Gilmer,* provides a forum for the vindication of public law rights." *Id.* at 88.

Finally, we question whether *Gilmer* can be applied where, as here, the arbitration clause at issue is not encompassed by the FAA. Section 1 of the FAA specifically excludes from the FAA's reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. We have previously concluded this language encompasses collective bargaining agreements, and have thus held the FAA "is generally inapplicable to labor arbitration." *United Food & Commercial Workers. Local Union 7R v. Safeway Stores*, 889 F. 2d 940, 944 (10th Cir. 1989). Because the arbitration clause at issue in *Gilmer* was not contained in a collective bargaining agreement, the Court was free to rely on the FAA for support. Here, in contrast, the arbitration clause at issue is contained in a collective bargaining agreement that is not covered by the FAA. Thus, *Alexander* provides the better reasoned authority for this situation. See Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's — Access, Adjudication, and Acceptability,* 31 Wake Forest L. Rev. 231, 262 (1996) (discussing FAA exemption issue).

In conclusion, we reject Potash's cross-appeal, and refuse to require plaintiff to exhaust the grievance procedures provided in the CBA.

Appendix A

IV.

With respect to plaintiff's appeal (No. 96-2045), we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this order. With respect to defendant Potash's cross-appeal (No. 96-2065), we AFFIRM the judgment of the district court.

APPENDIX B — MOTION TO DISMISS AND FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-94-691-JP

JEANNE HARRISON,

Plaintiff,

vs.

EDDY POTASH, INC., A New Mexico corporation, and **ROBERT L. BROWN,**

Defendants.

MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT

COMES NOW Eddy Potash, Inc. (*EPI*), by and through its attorneys, W.T. Martin, Jr., and Stephen S. Shanor of the Law Offices of W. T. Martin, Jr., P.A., and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and Rule 56 of the Federal Rules of Civil Procedure, move this Court to dismiss the action brought by the Plaintiff, Jeanne Harrison (*Harrison*), and to grant summary judgment on behalf of Eddy Potash, Inc. As grounds for the motion, EPI states:

1. That at all times relevant to this action there existed a Collective Bargaining Agreement (*CBA*) between EPI, the

United Steel Workers of America (*Steel Workers*). International Brotherhood of Electrical Workers (IBEW), and the Internal Association of Machinists and Aerospace Workers (*IAM*). (*A copy of the relevant portions of the Collective Bargaining Agreement is attached as Exhibit A and incorporate herein as if fully set forth.*)

2. That Harrison was a member of Steel Workers Union and a part of the unit represented by the Steel Workers Union at EPI.

3. That the CBA deals with wages and working conditions at EPI, and more particularly, deals with issues involving management and assignment of employees (*see Article 3 of the CBA*). The CBA prohibited discrimination on the basis of race, sex, etc. (*see Section 18.8 of the CBA*) The CBA also provided for an arbitration process to settle any disputes arising out the enforcement of the CBA (*see Articles 13 and 14 of the CBA*).

4. That at no time did Harrison file any type of grievance regarding the alleged sexual encounters or alleged sexual harassment on the job, nor did Harrison attempt to follow the arbitration provisions of the CBA.

5. That as a matter of law, Harrison was required to pursue the arbitration provisions of the CBA and is barred from pursuing action in court rather than pursuing remedy through the arbitration provisions provided in the CBA.

6. The undisputed facts in support of this motion are as follows:

Appendix B

A. There existed a Collective Bargaining Agreement between EPI and three unions: the Steel Workers, the IBEW and IAM. (*A copy of the Collective Bargaining Agreement is attached as Exhibit A and incorporated herein as if fully set forth.*)

B. Harrison was a member of the Steel Workers Union (*Harrison Dep., page 68*). (Exhibit B to this Motion).

C. At all times relevant to this action, the CBA was in effect. (*See Article 19 at page 47 of the CBA regarding contract term*).

D. That Harrison never filed any grievance or attempted to pursue the arbitration process as contained the CBA.

E. The CBA contains, at Article 3, page 5, a management rights clause which gives management the right to assign work, manage the employees ". . . except as they may be expressly abridged or modified by other terms of this agreement." (*CBA, Article 3, pages 5 and 6.*)

F. Article 18.8 of the CBA provides "the provisions of this agreement will applied to all employess without regard to sex, race, color, religious creed, national origin, protected disability, or age (over age 40 (40))." (*CBA, Article 18.8, page 44.*)

G. The CBA provided for a grievance and arbitration process as contained in Articles 13 and 14, beginning at page 27 and continuing through page 31 of the CBA. Grievance is defined in Article 13 of the CBA.

7. That the issue of sexual harassment is addressed by Article 18.8 of the CBA as it is applicable to Article 3 of the CBA. Therefore, Harrison was obligated to pursue the grievance and arbitration process contained in the CBA.

8. Pursuant to the Local Rules of the District Courts in New Mexico, a brief in support of this motion accompanies this motion.

9. That by the very nature of this motion, it is deemed opposed and counsel has not sought approval or concurrence by opposing counsel.

LAW OFFICES OF W. T. MARTIN JR., P.A.

By s/ W. T. Martin, Jr.
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Attorney for Defendants

Appendix B

CERTIFICATE OF SERVICE

Law Offices of W. T. Martin, Jr., P.A., certifies that it served a true and correct copy of the foregoing Eddy Potash, Inc.'s Motion to Dismiss and for Summary Judgment by placing same in the United States Mail, postage prepaid, addressed to Floyd D. Wilson and Katherine A. Basham, 6707 Academy Rd. NE, Albuquerque, New Mexico 87109 on the ____ day of _____, 1995.

s/ W. T. Martin, Jr.
W. T. Martin, Jr.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED JANUARY 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV No. 94-691 JP/WWD

JEANNE HARRISON,

Plaintiff,

vs.

EDDY POTASH, INC., a New Mexico Corporation, and ROBERT L. BROWN,

Defendants.

ORDER

The subjects of this order are: (1) defendant Eddy Potash, Inc.'s "Motion to Dismiss and Motion for Summary Judgment" (exhibit A to doc. #54), filed July 3, 1995; and (2) "Eddy Potash, Inc.'s and Robert L. Brown's Motion for Summary Judgment" (doc. #36), filed April 28, 1995. At a motion hearing held on January 8, 1996, Floyd Wilson represented plaintiff, and Tom Martin represented defendants. After careful consideration of the pleadings, law and facts, and after hearing arguments of counsel, I concluded that defendant Eddy Potash's Motion to Dismiss and Motion for Summary Judgment concerning defendant Eddy Potash's alleged right to compel arbitration should be denied and that defendants' Motion for Summary Judgment on plaintiff's claims of hostile work environment and sexual harassment should be denied in part and deferred in part.

Appendix C

I. Defendant Eddy Potash's Motion to Dismiss and Motion for Summary Judgment:

For the reasons stated orally on the record and in view of the actions already taken by the parties prior to the time defendant Eddy Potash first raised the issue of mandatory arbitration, I ruled that defendants had waived their right to compel arbitration. In making my ruling, I considered the factors set out by the Tenth Circuit Court of Appeals in *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir. 1994) and in *Peterson v. Shearson/American Express*, 849 F.2d 464, 465 (10th Cir. 1988).

II. Defendants' Motion for Summary Judgment:

I decided that plaintiff had raised genuine issues of material fact regarding her claim of hostile work environment. I deferred ruling on defendants' motion for summary judgment regarding plaintiff's claim of *quid pro quo* sexual harassment. I directed counsel to prepare a proposed verdict form in an effort to assess whether plaintiff is making a separate claim based on *quid pro quo* sexual harassment.

III. Other pre-trial matters:

At the hearing, counsel discussed whether there were any remaining evidentiary issues. Counsel for plaintiff stated that he may file a motion in limine regarding some evidentiary issues. Counsel for defendants noted that it was unlikely that defendants would call plaintiff's daughter as a witness at trial. Counsel indicated that they already had filed objections to each other's lists of exhibits. I admitted into evidence all the exhibits to which there were no objections filed and informed counsel that they may use admitted exhibits in opening statements.

Appendix C

I also advised counsel that by no later than January 22, 1996, they must file their proposed jury instructions with the Court and must mail copies of their proposed jury instructions to Judge Cook.

IT IS THEREFORE ORDERED that:

(1) defendant Eddy Potash, Inc.'s "Motion to Dismiss and Motion for Summary Judgment" (exhibit A to doc. #54) is DENIED;

(2) "Eddy Potash, Inc.'s and Robert L. Brown's Motion for Summary Judgment" (doc. #36) is DENIED in part and DEFERRED in part:

a. defendants' Motion for Summary Judgment on plaintiff's hostile work environment claim is DENIED; and

b. defendant's Motion for Summary Judgment on plaintiff's *quid pro quo* sexual harassment claim is DEFERRED;

(3) all exhibits to which there were no objections filed are admitted into evidence counsel may use admitted exhibits in opening statements; and

(4) by no later than January 22, 1996, counsel must file their proposed jury instructions with the Court and mail copies of their proposed jury instructions to Judge Cook.

s/ James A. Parker
UNITED STATES DISTRICT COURT

APPENDIX D — VERDICT FORMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM ONE
CIVIL RIGHTS ACTS CLAIM

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for violation of her civil rights by sexual harassment creating a hostile work environment, as against defendant Eddy Potash, Inc., find:

FOR PLAINTIFF, JEANNE HARRISON: _____

Amount of damages, if any:

Pain and Suffering:	$_____
Loss of Future Earning Capacity:	$_____
Emotional Distress:	$_____
Medical treatment	
past	$_____
future	$_____
rehabilitation	$_____

FOR DEFENDANT, EDDY POTASH, INC.: ✓

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson s/ Helene Minot Date 2/7/96

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM TWO
CIVIL RIGHTS ACTS — PUNITIVE DAMAGES

(You will proceed to determine Verdict Form Two *only* if you found in favor of the plaintiff, Jeanne Harrison, and awarded actual or nominal damages on Verdict Form One. If you found in favor of the Defendant, Eddy Potash, Inc., then you should not determine Verdict Form Two and you should proceed to determine Verdict Form Three.)

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for punitive damages for violation of her civil rights by sexual harassment creating a hostile work environment, as against defendant Eddy Potash, Inc., find:

FOR PLAINTIFF, JEANNE HARRISON: _____

Amount of punitive damages, if any: $_____

FOR DEFENDANT, EDDY POTASH, INC.: _____

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson_____ Date_____

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM THREE
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for intentional infliction of emotional distress, as against defendant Robert Brown, find:

FOR PLAINTIFF, JEANNE HARRISON: ✓

Amount of damages, if any:

Loss of Past Wages:	$27,000.00
Pain and Suffering:	$10,000.00
Loss of Future Earning Capacity:	$30,000.00
Emotional Distress:	$15,000.00
Medical treatment	
past	$3,000.00
future	$5,000.00
rehabilitation	$2,500.00

FOR DEFENDANT, ROBERT BROWN: ____

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson s/ Helene Minot Date 2/7/96

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM FOUR
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS — PUNITIVE DAMAGES

(You will proceed to determine Verdict Form Four *only* if you found in favor of the plaintiff, Jeanne Harrison, and awarded actual or nominal damages on Verdict Form Three. If you found in favor of the Defendant, Robert Brown, then you should not determine Verdict Form Four and you should proceed to determine Verdict Form Five.)

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for punitive damages for intentional infliction of emotional distress, as against defendant Robert Brown, find:

FOR PLAINTIFF, JEANNE HARRISON: ✓

Amount of punitive damages, if any: $20,000.00

FOR DEFENDANT, ROBERT BROWN: ____

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson s/ Helene Minot Date 2/7/96

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM FIVE
BATTERY CLAIM

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for Battery, as against defendant Robert Brown, find:

FOR PLAINTIFF, JEANNE HARRISON: ✓

Amount of damages, if any:

Loss of Past Wages:	$3000.00
Pain and Suffering:	$1000.00
Loss of Future Earning Capacity:	$3000.00
Emotional Distress:	$1600.00
Medical treatment	
past	$500.00
future	$600.00
rehabilitation	$300.00

FOR DEFENDANT, ROBERT BROWN: ____

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson s/ Helene Minot Date 2/7/96

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CV-94-691

JEANNE HARRISON,

Plaintiff,

vs.

ROBERT BROWN and EDDY POTASH, INC.,

Defendants.

VERDICT FORM SIX
BATTERY — PUNITIVE DAMAGES

(You will proceed to determine Verdict Form Six *only* if you found in favor of the plaintiff, Jeanne Harrison, and awarded actual or nominal damages on Verdict Form Five. If you found in favor of the Defendant, Robert Brown, then you should not determine Verdict Form Five, then your deliberations are concluded.)

We the jury in the above numbered and styled cause of action, based upon our unanimous decision, as to plaintiff Jeanne Harrison's claim for punitive damages for battery, as against defendant Robert Brown, find:

FOR PLAINTIFF, JEANNE HARRISON: ✓

Amount of punitive damages, if any: $20,000.00

FOR DEFENDANT, ROBERT BROWN: ____

Appendix D

(Please place your check mark indicating your unanimous verdict)

Foreperson s/ Helene Minot Date 2/7/96

APPENDIX E — EXCERPTS FROM LABOR AGREEMENT DATED JULY, 1989

EPI

LABOR AGREEMENT

BY AND BETWEEN

EDDY POTASH, INC.
AND

UNITED STEEL WORKERS OF AMERICA

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

JULY 1989

* * *

ARTICLE 2
MANAGEMENT RIGHTS

2.1 The management of the plant and the direction of the working forces including the planning, direction and control of plant operations, the scheduling of work and the assignment of employees to such work, including the right to assign employees to perform work outside of their job classification, the retirement of employees, the control and regulation of all equipment and other property of the Company, the determination of ability,

production standards, the quality and quantity of work to be produced, the determination of the products to be manufactured, the location or relocation of plants, the work to be assigned to each plant, the work to be contracted out, the methods, processes and means of manufacturing, the determination and establishment of any new or improved production methods or facilities, the establishment and enforcement of reasonable rules of conduct, and the right to maintain discipline and efficiency of all employees are all vested solely and exclusively in the Company, except as they may be expressly abridged or modified by other terms of this Agreement. It is further agreed that this enumeration of sole and exclusive management prerogatives shall not be deemed to exclude other prerogatives not herein enumerated, and the Company retains the right to exercise any other prerogatives or functions of management which are not abridged by a specific provision of this Agreement.

2.2 The Company retains the right to hire, suspend, discharge or discipline for just cause, transfer, and the right to relieve employees from duty because of lack of work or other legitimate reasons, provided that in the exercise of these rights the Company will not violate any of the terms of this Agreement.

2.3 In view of the recognized necessity for research and experiment by the Company, it is understood by both parties to this Agreement that construction and operation of experimental or pilot units shall not be subject to the terms of this Agreement. It is understood, however, that regular employees coming within the provisions of this Agreement who may be assigned to such construction work or temporary operations shall continue to be covered by the terms of this Agreement.

* * *

Appendix E

ARTICLE 13
GRIEVANCE PROCEDURE

13.1 The term "grievance" as used in this Agreement means any dispute between the Company and an employee or between the Company and the Union over the interpretation or application of terms of this Agreement where a discussion between the employee and his supervisor or the steward and the supervisor has not resulted in a resolution. A grievance will not include any desired or proposed changes in the terms of this Agreement or discharge of any employee occurring prior to the completion of his probationary period.

13.2 Step One. To be considered by the Company, a grievance must be reduced to writing on forms provided by the Company, dated, signed by the grievant(s), specify the section(s) of the Agreement alleged to have been violated, the remedy requested and presented by the steward, with or without the employee, to the grievant's supervisor within five (5) workdays of the time when the cause of the grievance is known or reasonably should be known to the grievant. After it is filed, an attempt will be made to settle the grievance at a meeting between the grievant, the steward and the grievant's supervisor.

13.3 Step Two. If no satisfactory settlement of the grievance is reached within five (5) workdays after submission under Step One above, the grievance may be appealed to Step Two, which shall be a meeting between no more than two Union representatives and the appropriate department head. The department head shall answer the Step Two appeal within five (5) workdays following the grievance meeting. If the written answer of the department head is not satisfactory to the Union, it may, within five (5) working days after the answer is received, refer the grievance to Step Three.

Appendix E

13.4 Step Three. Grievances referred to Step Three shall be discussed between the Human Resources Manager and the Union Grievance Committee. Union Staff Representatives may attend. The Human Resources Manager shall provide the Union with a written decision within five (5) working days following the Step Three meeting. Final disposition of the matter at the third step shall be noted on all copies of the grievance form and signed by the Human Resource Manager and the appropriate designated Union representative. If the Company and the Union are unable to resolve their differences, the Union may appeal the matter to arbitration as provided in Article 14.

13.5 The Union or the grievant may at any time drop or rescind the grievance by notice to the Company representative involved, in which event the dispute shall be considered settled and all procedures relative thereto terminated.

13.6 Delays in grievance and arbitration time tables may be provided for only by written mutual agreement between the Company and the Union.

13.7 Investigating of grievances and interviewing of employees regarding grievances shall be done in such a manner and at such time and place as will result in the least interference with Company operations. When attending scheduled grievance meetings, no employee shall be deprived of his regular earnings.

13.8 If Management's decision in any step of this procedure is not appealed by the Union to the next step within the time limits provided for such appeal, the particular grievance shall be deemed closed. Should Management fail to respond to a grievance within the time limits specified, the grievance will be resolved in favor of the grievant. Any grievance resolved by

failure of either party to meet a time requirment shall be considered resolved with no precedent being set.

ARTICLE 14
ARBITRATION

14.1 If a grievance is not settled by the procedure set forth in the Grievance Procedure, the aggrieved party may, upon written notice to the other party, refer the grievance to arbitration. This shall be done not later than ten (10) working days following receipt of the Step Three answer. No employee may compel the arbitration of a grievance without the written consent of the Union.

14.2 A single impartial arbitrator may be mutually agreed upon by the parties. In case of failure to agree upon an arbitrator within ten (10) days from the date of receipt of the written notice specified in Section One of this Article, the aggrieved party may, within five (5) days thereafter, request the Federal Mediation and Conciliation Service to submit a panel of seven names from which an arbitrator may be selected. The arbitrator so selected or agreed upon shall have the authority to interpret and apply the provisions of this Agreement but shall not have authority to alter, add to or disregard any of its provisions or decide any matter not covered by a specific provision of this Agreement. No question of a change in the wage scale or a change in differentials of pay shall be the subject of arbitration unless as specifically mutually agreed by the parties.

14.3 The decision of the arbitrator shall be final and binding on the parties concerned. The decision and opinion shall be in writing and shall be rendered within thirty (30) days of the last hearing on the matter conducted by the arbitrator, or within thirty

(30) days of the receipt of post-hearing briefs, whichever is later. It is understood and agreed that no more than one written grievance shall be the subject matter of a single arbitration. However, grievances arising out of the same facts and circumstances and relating to the same issue shall be submitted to a single arbitrator.

14.4 The necessary expenses of the arbitrator shall be borne equally by the parties.

EQUAL OPPORTUNITY

18.8 The provisions of this agreement will be applied to all employees without regard to sex, race, color, religious creed, national origin or age (over age forty (40)).

APPENDIX F — RELEVANT STATUTES

A. The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, **42 U.S.C. §§ 2000e,** et seq. ("Title VII") as set forth below:

> **Section 2000e-2. Unlawful employment practices**
>
> **(a) Employer practices.** It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Appendix F

B. NLRA National Labor Relations Act

Section 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

C. The pertinent provisions of the Federal Arbitration Act

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S C. § 2, provides as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides as follows:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 16 of the FAA, 9 U.S.C. § 16, provides as follows (materials in brackets added):

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title [9 U.S.C. § 3],

(B) denying a petition under section 4 of this title [9 U.S.C. § 4] to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in

> section 1292(b) of title 28 [28 U.S.C. § 1292(b)], an appeal may not be taken from an interlocutory order —
>
> (1) granting a stay of any action under section 3 of this title [9 U.S.C. § 3];
>
> (2) directing arbitration to proceed under section 4 of this title [9 U.S.C § 4];
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

D. The pertinent section of the Civil Rights Act of 1991 is as follows:

> **Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991), provides as follows:**
>
> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and

> arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

E. The pertinent section of the Americans with Disabilities Act of 1990 is as follows:

> **Section 12212 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12212, provides as follows:**
>
> > Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Appendix F

Restatement (Second) of Agency § 219 (1957 Main Vol.)

Restatement of the Law Second
Agency 2d
Chapter 7. Liability of Principal to Third Person; Torts
Topic 2. Liability for Authorized Conduct or
Conduct Incidental Thereto
Title B. Torts of Servants

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§ 219. WHEN MASTER IS LIABLE FOR TORTS OF HIS SERVANTS

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 97-232

In The

Supreme Court of the United States

October Term, 1996

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Jeanne Harrison submits the following Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner Eddy Potash, Inc. ("EPI") pursuant to Sup.Ct.R. 15.

I. STATEMENT OF THE CASE.

Ms. Harrison does not concur in EPI's statement of relevant facts, and refers the Court to the statement of facts in the opinion of the Tenth Circuit for a more accurate and complete statement of the facts of this matter. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-42 (10th Cir. 1997); Petition for a Writ of Certiorari ("Petition"), App. A at 3a-9a.

In addition, Ms. Harrison notes that EPI misstates the extent of supervisor Robert Brown's authority. Brown made recommendations on discipline, termination, and promotions, his opinions were solicited, his recommendations were considered and usually followed by higher level management, and he otherwise participated in these matters. 10th Cir. App. I, pp. 8-9 (testimony of Brown); 10th Cir. App. J, pp. 10, 13, 16, 21-22, 24, 35-36, 56, 59 (testimony of Jim Ryan, EPI's Vice-President of Operations and General Manager).

II. ANY REVIEW THAT MAY BE NECESSARY IS PREMATURE.

This is an interlocutory matter. The Tenth Circuit merely reversed the judgment of the District Court and remanded for further proceedings. 112 F.3d at 1454, Petition, App. A at 42a. Since this matter has not been

brought to a final judgment, review at this time would be premature. *Virginia Military Institute v. United States*, 508 U.S. 946, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993).

III. THE COURT SHOULD DENY CERTIORARI ON THE EMPLOYER LIABILITY ISSUE.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THE BASES FOR EMPLOYER LIABILITY.

The first issue in this case concerns the bases, under Title VII, for holding an employer liable for sexual harassment committed by a supervisor. In this case, Jeanne Harrison's supervisor, Robert Brown, was only able to accomplish his sexual assaults because, as Ms. Harrison's supervisor, he could order other people to take Ms. Harrison's usual job, require Ms. Harrison to go with him on the pretext of doing certain tasks, and take her to isolated locations in the mine where the assaults could occur without fear of discovery. Jeanne Harrison therefore sought to hold EPI liable under the second clause of Restatement (Second) of Agency § 219(2)(d) (1958). Section 219(2)(d) provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*

(emphasis added). The district court refused Ms. Harrison's instructions based on this section, but the Tenth Circuit reversed, holding that an employer would be liable for the harassment of its supervisor

> [i]f the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. See Restatement (Second) of Agency § 219(2)(d), clause 2.

112 F.3d at 1446, Petition, App. A at 20a.

In applying Restatement (Second) of Agency § 219(2)(d), the Tenth Circuit followed this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). In that case, the Court directed lower courts to look to the law of agency in determining the liability of employers, and specifically cited Restatement (Second) of Agency §§ 219-237 (1958). 477 U.S. at 72, 106 S.Ct. at 2408.

The Tenth Circuit correctly interpreted § 219(2)(d). The plain language of this section provides for two distinct bases of employer liability. Liability exists if there was reliance on apparent authority "or" if the supervisor was aided by the agency relationship. EPI's interpretation, requiring apparent authority for the second clause as well as the first, renders the second clause superfluous. If apparent authority is required for both clauses, they both mean the same thing.

It is only fair that the employer be held liable when the supervisor is aided by the agency relationship, since

the employer has enabled the harassment to occur by investing the supervisor with powers necessary to commit the harassment.

B. THE DECISION BELOW DOES NOT CONTRADICT *MERITOR SAVINGS BANK, F.S.B. V. VINSON*

1. The Tenth Circuit did not create "strict liability."

EPI contends that the Tenth Circuit's opinion in this case is contrary to the Court's opinion in *Meritor,* because it adopted a standard of "strict liability." *Meritor* instructs that employers are not "always automatically liable," because Congress wanted liability to be limited by the principles of agency law. *Meritor, supra,* 477 U.S. at 72, 106 S.Ct. at 2408. The standards that place limits on employer liability and that prevent liability from being automatic are therefore the standards of agency law.

By applying Restatement (Second) of Agency § 219(2)(d), the Tenth Circuit followed *Meritor,* and placed limitations from agency law on the liability of employers, such that they are not automatically liable. Under this section, as applied by the Tenth Circuit, employers are only liable if supervisors use their delegated authority over the employees' work environments to aid them in accomplishing the harassment. The Tenth Circuit did not create automatic liability, but held that liability could only be imposed if this criterion from agency law is met.

Nonetheless, EPI claims that the Tenth Circuit's ruling is tantamount to "strict liability" because, "[b]y its

very nature, the employment relationship brings the supervisor and the employee together at the place of employment and assists the supervisor in the accomplishment of the harassment." Petition at 10; *see also,* Petition at 13-14. However, as EPI acknowledges, the Tenth Circuit specifically provided that liability does not attach "where the harasser's agency relationship merely provided him with proximity to plaintiff." 112 F.3d at 1446, Petition, App. A at 19a.

If the rule adopted by the Tenth Circuit resulted in liability in every case, liability under Restatement § 219(2)(d) would have been argued in many cases. Instead, as the cases cited by EPI demonstrate, cases such as the present one, in which the facts clearly support a claim under § 219(2)(d), occur only infrequently.

2. The decision below followed *Meritor* in holding that a policy against discrimination and a grievance procedure are relevant evidence.

The Tenth Circuit discussed the effect of the establishment and implementation of a policy against sexual harassment under both clauses of the Restatement (Second) of Agency § 219(2)(d). With respect to the first clause, the Tenth Circuit held that

> if an employer has taken steps "to remove any possible inference that a supervisor has authority to sexually harass his subordinates," 48 Vand.L.Rev. at 1087, the victim is likely aware the harassment is not authorized, and reliance on apparent authority will be difficult to establish. Accordingly, the question of whether the

> employer established and implemented a policy against sexual harassment is an important factor in deciding whether apparent authority existed.

112 F.3d at 1450, Petition, App. A at 30a-31a. *See also* 112 F.3d at 1444, Petition, App. A at 15a. In contrast, the Tenth Circuit concluded that a sexual harassment policy is not determinative under the second clause of § 219(2)(d) of whether a supervisor used delegated authority over the work environment to facilitate the harassment. 112 F.3d at 1446, Petition, App. A at 19a. *See also* 112 F.3d at 1445, Petition, App. A at 16a.

In so holding, the Tenth Circuit followed this Court's decision in *Meritor*. In that case, the Court stated:

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, . . . they are not necessarily dispositive.

477 U.S. at 72, 106 S.Ct. at 2408. The Tenth Circuit followed this holding by concluding that evidence of the existence and implementation of a policy against harassment was relevant, but not dispositive of all agency issues.

Even if EPI's policy against discrimination and grievance procedure were dispositive of claims under the second clause of § 219(2)(d), as claimed by EPI, there would be factual issues respecting the dissemination of the policy. *See Gary v. Long*, 59 F.3d 1391, 1398 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995)

(defense depends on the ability of the employer to establish that its employees could not reasonably have failed to know of the policy and grievance procedure). EPI claims that its sexual harassment policy "was posted on all bulletin boards where any employee wishing to read it had the opportunity to read such policy." Petition at 3. This contention is not supported by the record. See the Tenth Circuit's discussion of this issue found at 112 F.3d 1442, Petition, App. A at 9a.

EPI's testimony as to dissemination was that the policy was distributed to supervisors "with instructions to . . . post it on the bulletin board in the work area," 10th Cir. App. K, p. 49, and that it was "placed on bulletin boards out on the surface, in the office and underground," 10th Cir. App. J, p. 61. There was no testimony as to whether the policy was placed on *all* bulletin boards or whether copies of the policy remained on any bulletin boards, or remained uncovered, after they were posted in 1989.

Ms. Harrison specifically testified that the policy was not posted on the board near the mine shaft or the board in the women's changing room, the particular bulletin boards where she might have seen it. 10th Cir. App. H, p. 91. It is undisputed that EPI never gave Ms. Harrison a copy of the sexual harassment policy and never discussed the policy with her. 10th Cir. App. H, pp. 15-16. Ms. Harrison did not discover the sexual harassment policy until after some of the sexual assaults by Mr. Brown had already occurred, when she discovered it by chance in a shop where she did not usually work. 10th Cir. App. H, pp. 92-93. Thus, even if EPI's discrimination policy was relevant to a determination of whether Mr. Brown was

aided in accomplishing the harassment by his authority to control Ms. Harrison's work environment, there would be fact issues as to whether the policy was adequately disseminated to EPI's employees.

C. THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS REQUIRING IMMEDIATE CLARIFICATION BY THE COURT.

EPI greatly overstates the extent of the conflicts with the holding of the Tenth Circuit. Few cases have discussed liability under the second clause of Restatement (Second) of Agency § 219(2)(d). Although some of the cases cited by EPI state what appear to be narrower grounds for employer liability than that set forth by the Tenth Circuit, the cases mostly do not involve situations where the supervisor was aided by the use of his delegated authority and do not involve claims that liability should be predicated on the second clause of Restatement (Second) of Agency § 219(2)(d). If presented with appropriate facts and a claim of liability under the second clause of § 219(2)(d), other courts might agree with the standard stated by the Tenth Circuit.

Further, there is no conflict with the decisions cited by EPI on the issue of the effect of policies against harassment and remedial procedures and actions. The decisions cited by EPI find that evidence of such policies, procedures, and actions are relevant to the following particular issues: negligence in responding to known harassment, *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); the supervisor's apparent authority, *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3rd

Cir. 1994); and the employer's diligence in seeking to be apprised of the conduct of its employees for the purpose of imputing constructive knowledge of harassment to the employer, *Farley v. American Cast Iron Pipe Company*, 115 F.3d 1548, 1554 (11th Cir. 1997). In this case, the Tenth Circuit similarly held that evidence of a sexual harassment policy is relevant to a particular issue, a supervisor's apparent authority to harass. 112 F.3d at 1450, Petition, App. A at 30a-31a. The Tenth Circuit did not hold that evidence of a harassment policy and remedial procedures are not relevant to the other issues as to which such evidence was found to be relevant in the cases cited by EPI. There is thus no conflict among these cases.

Moreover, any conflicts that may exist are not intolerable. EPI overstates the importance of this issue. As demonstrated by the fact patterns in the cases cited by EPI, supervisors do not frequently use their delegated authority to control the work environment in accomplishing sexual harassment. The rights of few litigants will be affected by a decision not to address this issue at this time.

EPI argues without explanation that it is "obvious" that employers can have substantial difficulty in implementing different work rules in different circuits because of the claimed different standards for employer liability. Petition at 18. In fact, the standard for employer liability should not effect work rules. Sexual harassment is against the law and just plain wrong. Regardless of what the details of the employer liability standard are, an employer should create and adequately publicize a policy

against sexual harassment, implement an effective reporting procedure for when it does occur, and take vigorous steps to put an end to harassment whenever it is reported.

EPI also claims, again without elaboration, that the decision of the Tenth Circuit "dampens, if not destroys" the incentive to adopt and enforce a policy against sexual harassment. Petition at 18. This claim similarly does not stand up to scrutiny. Employers will always be motivated to adopt policies against sexual harassment and educate their employees about the policies because they want to stop sexual harassment claims, which are costly to them. If there are more circumstances in which the employer may be liable for a supervisor's harassment, the motivation to stop harassment in the first instance will only increase, not decrease. *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3rd Cir. 1994).

Moreover, employers also have ample incentive to put an end to harassment when it does occur. If an employer learns of harassment, but does nothing, damages will continue to mount. Employers will also be exposing themselves to liability under Restatement (Second) of Agency § 219(2)(b), which provides for liability when the employer is negligent in failing to respond to known harassment. They will be opening themselves up to punitive damage claims. Finally, if an employer vigorously enforces its sexual harassment policy, it will be sending a message to its work force that an employee who engages in sexual harassment will face serious consequences. There will then be likely to be fewer incidents of sexual harassment and fewer claims against the employer in the future. There is thus ample economic

incentive to motivate an employer to do everything that it can to prevent harassment and to put an end to harassment if it does occur.

The Court denied certiorari in the past term in at least one case presenting the issue of the basis for imposing liability on employers under Title VII. *OI-NEG TV Products, Inc. v. Durko, cert. denied,* 65 U.S.L.W. 3688 (No. 96-1263; unpublished court of appeals decision; summary published at 65 U.S.L.W. 3603).

IV. THE COURT SHOULD DENY CERTIORARI ON THE ISSUE OF WHETHER THE ARBITRATION PROVISIONS IN THE COLLECTIVE BARGAINING AGREEMENT REQUIRED MS. HARRISON TO ARBITRATE HER TITLE VII CLAIMS

Certiorari should be denied on the issue of whether the arbitration provisions in the Collective Bargaining Agreement ("CBA") between EPI and Ms. Harrison's union compelled Ms. Harrison to arbitrate her Title VII claims because (1) the Tenth Circuit's opinion is consistent with the great weight of the case law, including *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); (2) the District Court correctly found that EPI's delay in asserting the arbitration issue resulted in EPI's waiving that claim; and (3) claims based upon Ms. Harrison's rights under Title VII are not within the scope of the arbitration provisions of the CBA.

A. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE GREAT WEIGHT OF AUTHORITY, INCLUDING THIS COURT'S PRIOR DECISIONS

EPI acknowledges that its position on the arbitration issue is contrary to this Court's decision in *Alexander v. Gardner-Denver Co., supra.* In essence, EPI is asking this Court to overrule *Gardner-Denver.* EPI places its primary reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). *Gilmer*, however, specifically discusses *Gardner-Denver*, and at 500 U.S. at 33-35, 111 S.Ct. 1656-7 confirms the reasoning and holding of *Gardner-Denver* in the specific context involved here; i.e., whether an arbitration provision in a collective bargaining agreement deprives an individual employee of his or her right to litigate a Title VII claim in court. Moreover, in *Livadas v. Bradshaw, supra*, 512 U.S. at 127, 114 S.Ct. at 2080, n. 21, this Court referred to the interplay between *Gardner-Denver* and *Gilmer*, as follows:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*

It is thus difficult to argue that *Gardner-Denver* is no longer good law, since this Court has repeatedly said that it is.

Other federal courts have also recognized that *Gardner-Denver*, and not *Gilmer*, continues to govern the issue of whether an employee can be forced to arbitrate federal statutory claims in the collective bargaining

agreement context. *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117-8 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996); *Griffith v. Keystone Steel and Wire Company, Inc.*, 858 F. Supp. 802, 804 (C.D. Ill. 1994); *Bush v. Carrier Air Conditioning*, 940 F. Supp 1040 (E.D. Tex. 1996), and cases cited; *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Ore. 1994); *DiPiccio v. United Parcel Service*, 890 F. Supp. 688, 691-2 (N.D. Oh. 1995).

As the Tenth Circuit noted at 112 F.3d 1453, Petition, App. A at 38a, *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), is, to a degree, inconsistent with the Tenth Circuit's opinion. *Austin* can be factually distinguished, however, in that the collective bargaining agreement involved there specifically provided for the use of grievance procedures to resolve the plaintiff's claims under the Americans With Disabilities Act. 78 F.3d at 879-80. The CBA in the present case, however, does not provide for its grievance procedures to be used to resolve Title VII claims. See Section IV C., infra.

B. EPI HAS WAIVED THE ARBITRATION ISSUE

The District Court's January 8, 1996 Order, Petition, App. C at 48a-50a found that:

> For the reasons stated orally on the record and in view of the actions already taken by the parties prior to the time Defendant Eddy Potash first raised the issue of mandatory arbitration, I ruled that Defendants had waived their right to compel arbitration. In making my ruling, I considered the factors set forth by the Tenth Circuit

> *Fenner & Smith*, 39 F.2d 1482, 1489 [10th Cir. 1994] and in *Peterson v. Shearson/American Express*, 849 F.2d 464, 465 [10th Cir. 1988].

Petition, App. C at 49a.

The District Court's finding of waiver is well supported by the record. Ms. Harrison's Complaint was filed on June 21, 1994. 10th Cir. App. A. EPI's Answer and Counterclaim made no reference to any alleged agreement to arbitrate and EPI affirmatively invoked the jurisdiction of the District Court by filing a Counterclaim against Ms. Harrison. 10th Cir. App. B. In the Pretrial Order, EPI made no reference to any alleged agreement to arbitrate, never challenged the jurisdiction of the District Court, and expressly stipulated that the District Court had jurisdiction of the parties and the subject matter. 10th Cir. App. C.

The first time EPI raised the issue of arbitration was its Motion to Dismiss, and Motion for Summary Judgment, filed on July 3, 1995, after this case had been pending in the District Court for more than a year. 10th Cir. App. D. As of that time, the parties had conducted extensive discovery and had incurred substantial attorney's fees, as well as other litigation expenses. Prior to the filing of the Motion to Dismiss and Motion for Summary Judgment on the issue of arbitration, EPI had filed several earlier Motions to Dismiss and/or Motions for Summary Judgment to which Ms. Harrison had to respond. As of the time EPI filed its Motion to Dismiss, the case had already been set for a trial on the merits. 10th Cir. App. T at 532, Docket Entry 39.

A party seeking to compel arbitration waives its right to arbitrate by participating in the litigation for a substantial period of time, and when important intervening steps, including such things as deposing witnesses, filing motions, filing counterclaims, etc., have taken place. *Metz v. Merrill Lynch Pierce Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994). When this case was before the Tenth Circuit, EPI never attempted to challenge the District Court's waiver ruling on a factual basis. Instead, EPI argued that there can never be a waiver of an arbitration clause in a collective bargaining argument. Thus, under EPI's theory, an employer could wait until the employee's Title VII claim had been tried on the merits in federal district court, or could even wait until after an appeal had been concluded in a federal court of appeals, before raising the "arbitration" issue.

Fortunately, the law does not support EPI's position. *Baca v. Sipes*, 386 U.S. 171, 185, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967), states:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the [collective bargaining] contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. [citing authorities] In such a situation [and there may, of course, be others], the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

A party to a collective bargaining agreement can waive the arbitration provisions of that agreement by its delay in asserting the arbitration provision after litigation

had been commenced. *Reid Burton Construction v. Carpenter's District Council of Southern Colorado*, 614 F.2d 698, 702 (10th Cir. 1980); *Jones Motor Company v. Chauffeurs, Teamsters and Helpers Local Union No. 633*, 671 F.2d 38 (1st Cir. 1982); *E.T. Simonds Construction Company v. Local 1330, International Hod Carriers*, 315 F.2d 291 (7th Cir. 1963) and cases cited. *See Varner v. National Super Markets, Inc., supra* at 94 F.3d 1213 (the only prerequisites to a federal court having jurisdiction over a Title VII claim are those found in Title VII itself).

C. MS. HARRISON'S TITLE VII CLAIMS AGAINST EPI ARE NOT WITHIN THE SCOPE OF THE ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

Section 14.1 of the CBA states:

> If a **grievance** is not settled by the procedure set forth in the Grievance Procedure, the Union may upon written notice to the Company, refer the grievance to arbitration. This shall be done no later than ten [10] working days following receipt of the Step Three Answer. No employee may compel the arbitration of a grievance without the written consent of the Union. (emphasis added)

Petition, App. E at 67a.

The arbitration provision, by its terms, only applies to a "grievance." Section 13.1 of the CBA defines "grievance" as meaning "any dispute between the Company and an employee or between the Company and the Union **over the interpretation or application of terms of this**

Agreement." (emphasis added) Petition, App. E at 65a. Ms. Harrison's Title VII claims did not involve the "interpretation or application of terms of [the CBA]." Instead, Ms. Harrison's claims against EPI involved the interpretation and application of Title VII, the New Mexico Human Rights Act, and various common law causes of action. Ms. Harrison's right not to be sexually assaulted existed independently of the CBA.

Alexander v. Gardner-Denver Company, supra, states:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both are violated as a result of the same factual occurrence.

415 U.S. at 49-50, 94 S.Ct. at 1020.

Similarly, in *Gilmer v. Interstate/Johnson Lane Corp., supra,* this Court stated:

> In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights.

500 U.S. at 34, 111 S.Ct. at 1656-7.

See also Griffith v. Keystone Steel & Wire Company, supra, which held that an arbitration provision in a collective bargaining agreement did not prevent the employee from pursuing his Title VII claim in court, stating:

> He is not suing to enforce contractual rights, which would be covered by the CBA, but rather his statutory rights under Title VII.

858 F. Supp. at 804.[1]

Had it been the intent of the CBA that any and all disputes between EPI and one of its union employees was subject to arbitration, the CBA would have defined "grievance" to include any and all such disputes. Instead, the CBA limits the definition of "grievance" so as to relate only to disputes "over the interpretation or application of terms of [the] Agreement." Ms. Harrison is not suing to enforce contractual rights created by the CBA, but rather is suing to enforce her statutory rights under Title VII.

A highly analogous case is *Hawaiian Air Lines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Mr. Norris' employment with Hawaiian Air Lines was subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. The RLA had set up a mandatory arbitration mechanism to handle disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 43 U.S.C. § 153, 512 U.S. at 248. The question presented in the *Norris* opinion " . . . is whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered

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[1] The Collective Bargaining Agreement in the present case contains a general "non-discrimination" provision. Petitioner's App. at p. 68a. The collective bargaining agreement involved in *Griffith* had a materially identical "non-discrimination" provision. 858 F. Supp. at 803.

unsafe and for reporting his safety concerns to the Federal Aviation Administration may pursue available state-law remedies for wrongful discharge, or whether he may seek redress only through the RLA's arbitral mechanism." 512 U.S. at 248, 114 S.Ct. at 2241. A unanimous Court held that the RLA did not preempt Mr. Norris' state-law causes of action. 512 U.S. at 248, 114 S.Ct. at 2241. This decision was based upon the applicable statutory language which, as noted above, provided for arbitration only with regard to disputes "growing out of grievances or out of the interpretation or application of [the CBA]. . . . " This Court first noted its belief " . . . that the most natural reading of the term 'grievances' in this context is as a synonym for disputes involving the application or interpretation of a CBA." 512 U.S. at 255, 114 S.Ct. at 2245. *Norris* also refers to several United States Supreme Court opinions which held that the RLA's arbitration provisions do " . . . not pre-empt causes of action to enforce rights that are independent of the CBA." 512 U.S. at 256, 114 S.Ct. at 2246, and that "substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA." 512 U.S. at 257, 114 S.Ct. at 2246. It is only when the CBA is the "only source" of the employee's rights against the employer, that arbitration is required. 512 U.S. at 257-8, 114 S.Ct. at 2246. If, on the other hand, the CBA is not the "only source" of the employee's rights against the employer; i.e., if the employee's claims are based upon provisions of state or federal[2] law which are

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[2] *See Atchison Topeka and Santa Fe Railway Company v. Buell*, 48 U.S. 557, 107 S. Ct. 1410, 94 L.Ed.2d 563 (1987).

not dependent upon any provision of the CBA, then the dispute is not within the scope of the arbitration mechanism referred to above. 512 U.S. at 258, 114 S.Ct. at 2247

Similar considerations are applicable here. Just as the applicable statute in *Norris* provided only for arbitration with respect to disputes involving the "interpretation or application" of the CBA; so it is that the arbitration provisions of the CBA here, provides for arbitration only for disputes involving the "interpretation or application" of the CBA. As *Norris* makes clear, such language does not require arbitration of claims based upon provisions of state and/or federal law which are not dependent upon the CBA.

As noted above, the scope of the arbitration provision contained in the present case factually distinguishes this case from *Austin v. Owens-Brockway Glass Container, Inc., supra,* in which the "arbitration" provision in the CBA specifically referred to arbitration of an employee's claims under the Americans With Disabilities Act. At 78 F.3d 885, *Austin* emphasizes this factual distinction in stating that "Miss Austin is a party to a voluntary agreement to submit statutory claims to arbitration. The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration." The Fourth Circuit itself has recognized this distinction, and has held that when an arbitration clause in a collective bargaining agreement merely requires arbitration of grievances that involve "interpretation or application" of the CBA, such language does not require arbitration of the employee's statutory claims. *Martin Marietta v. Maryland Commission on Human Relations,* 38 F.3d 1392, 1402 (4th Cir 1994), states:

What distinguishes *Gilmer* from the instant case is that the broad mandatory language of the arbitration clause at issue in *Gilmer*, which encompassed a New York Stock Exchange rule, provided that Gilmer must arbitrate "any dispute, claim or controversy" arising with his employer. *Id.* at 23, 111 S.Ct. at 1650. The CBA arbitration clause applicable to Price is more narrow, as it is written in permissive terms and encompasses only grievances that involve "interpretation or application" of CBA provisions.

V. CONCLUSION

Sup.Ct.R. 10.1 provides that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor. EPI's Petition fails to meet that standard. EPI's Petition for Writ of Certiorari should be denied, as to all issues.

Respectfully submitted,

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No. 97-232

In The

Supreme Court of the United States

October Term, 1996

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTRODUCTION

The only new issue raised by Jeanne Harrison ("Harrison") in Reply to Eddy Potash, Inc.'s ("EPI"), Petition for Writ of Certiorari is the issue of EPI having waived the arbitration issue. Because Harrison is in error on that issue, EPI deems a reply necessary.

THE WAIVER ISSUE

A. EPI has not waived the arbitration issue. Harrison's failure to invoke the arbitration provision and the grievance procedure in the Collective Bargaining Agreement ("CBA") results in a defect in the subject matter jurisdiction.

Harrison begins her Response with the premise that a party seeking to compel arbitration waives its right to arbitrate by participating in litigation for a substantial period of time. Harrison continues with a recitation of factors the Court should examine in determining whether a party has waived its right to arbitration. Harrison fails to address the issue raised by EPI in its Petition for Writ of Certiorari. EPI has not sought to compel arbitration. Rather, EPI raised the issue of Harrison's failure to exhaust contractual remedies in the CBA, thereby resulting in a failure of the court to have subject matter jurisdiction, which is an issue that can be raised at any time under Fed. R. Civ. P. 12(h)(3).

As stated in EPI's Petition for Writ of Certiorari, there existed a CBA at EPI. By means of the CBA, certain terms of employment were reached between EPI and its hourly employees. One of the terms of employment was an employee, such as Harrison, agreed to forego her rights to proceed in the District Court on her employment claims and to pursue those claims through the grievance procedure and arbitration process.

EPI contends Title VII claims were likewise subject to this mandatory process. Therefore, Harrison's remedy was not through the District Court but through the grievance/arbitration procedure contained in the CBA. Her failure to invoke the grievance process and to proceed to arbitration on her Title VII claims resulted in a jurisdictional defect, thereby denying the Court of subject matter jurisdiction. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614, 58 BNA LRRM 2193, 51 CCH LC ¶ 19,458 (1965). *See also Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

Since 1965, the law has been clear that if a party sidesteps a CBA's grievance/arbitration machinery by suing in federal court without having attempted to invoke the grievance/arbitration process, that party's claim in federal court must be dismissed. The failure to exhaust contractual remedies is not merely an affirmative defense that is waived if not asserted in an answer. Exhaustion of mandatory contractual remedies is a prerequisite to the right of an employee, the union, or an employer to bring a federal court action under § 301 for breach of a collective bargaining agreement. The failure to exhaust can be characterized as a lack of subject matter jurisdiction or as a failure to state a claim upon which relief may be granted. *Republic Steel Corp. v. Maddox, supra*. Harrison's argument that EPI should have raised her alleged failure to exhaust contractual remedies in its Answer or that EPI has, by its actions in the litigation, waived the defense, must be rejected. The failure to exhaust the contractual remedies goes to the Court's subject matter jurisdiction and can be raised at any time by any party or by the Court under Fed. R. Civ. P. 12(h)(3). *Camean v. F/V Lady J*, 654 F. Supp. 709, 712, 107 CCH LC ¶ 10,038 (D.C. Mass. 1985). Federal labor policy requires that individual employees wishing to assert contract grievances attempt to use the contract grievance procedure negotiated by the employer and union as the mode of redress. *Republic Steel Corp. v. Maddox, supra*;

Bonser v. Safeway, Inc., 809 F. Supp 799, 801-02 (D. Colo. 1992). There exists a multitude of cases throughout the United States which recognize that an employee must, as a prerequisite to bringing suit in federal court, attempt to exhaust his contractual remedies as contained in the collective bargaining agreement, *see, e.g., Mitchell v. Pepsi Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047, 89 L. Ed. 2d 575, 106 S. Ct. 1266; *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985), *cert. denied*, 471 U.S. 1102, 85 L. Ed. 2d 846, 105 S. Ct. 2329.

In the present case, Harrison failed to follow the mandatory grievance procedure and arbitration process. Her failure to exhaust the contractual remedies denies the Court of jurisdiction of the subject matter. As the Court is well aware, a claim of lack of subject matter jurisdiction can be raised at any time and subject matter jurisdiction cannot be waived. *Camean v. F/V Lady J, supra.* Therefore, Harrison's argument of waiver fails and should be rejected by this Court in its entirety.

The cases cited by Harrison from various Circuits regarding waiver of the right to compel arbitration completely miss the point as EPI did not seek to compel arbitration but raised an issue akin to failure to exhaust administrative remedies as a prerequisite to the Court having subject matter jurisdiction. The waiver argument should not deter this Court from granting certiorari on a matter of compelling national interest.

CONCLUSION

For the reasons set forth above, as well as those cited in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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